IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 677

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

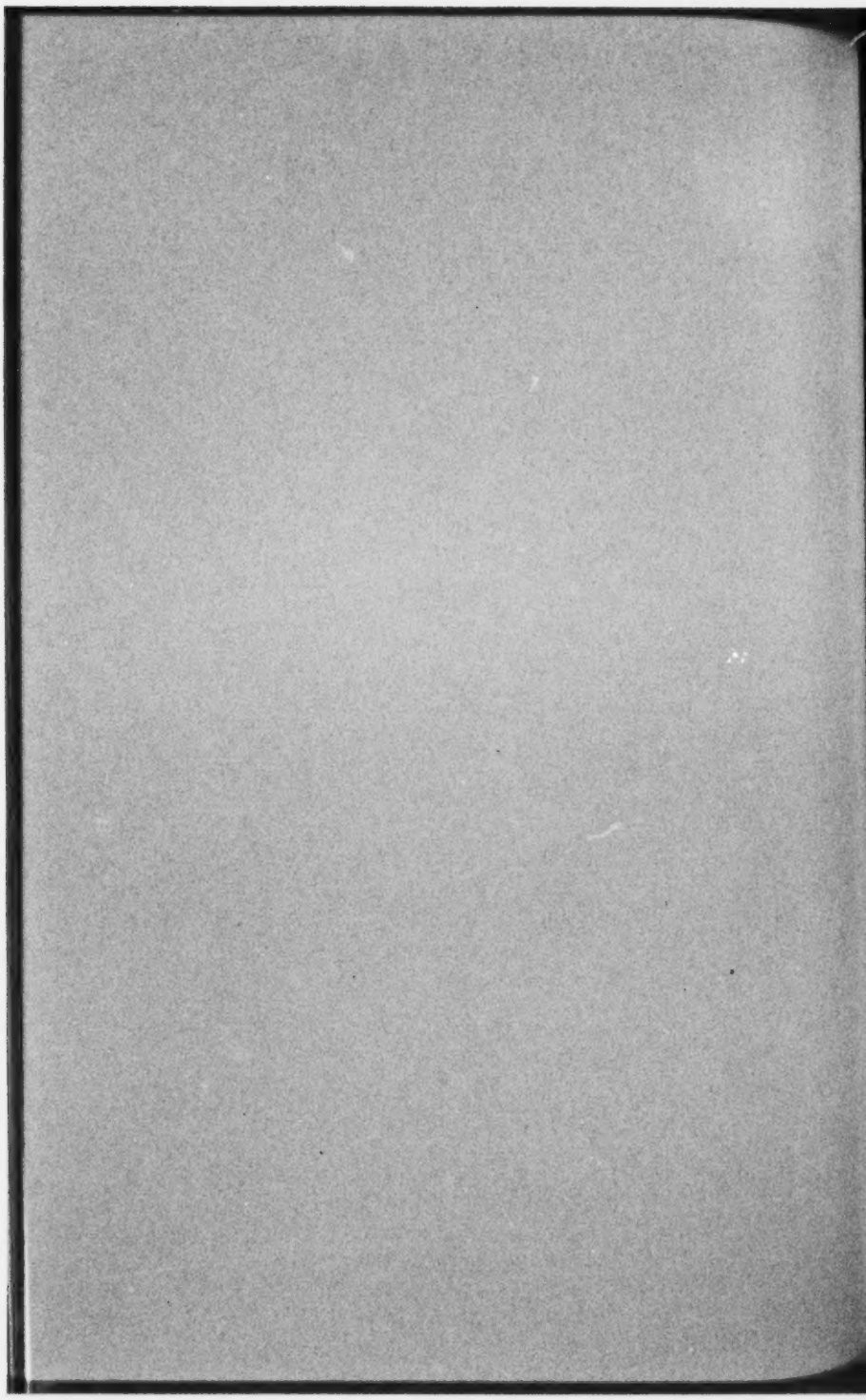
KENTUCKY RIVER COAL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOSEPH S. GRAYDON, Cincinnati, Ohio,
BUFORD C. TYNES, Huntington, W. Va.,
Attorneys for Petitioner.

Of Counsel:
CADWALADER, WICKERSHAM & TAFT,
New York City.
MAXWELL & RAMSEY,
Cincinnati, Ohio.

LESLIE WRAXTON PUBLISHER, CINCINNATI, OHIO



TOPICAL INDEX

PAGE

ALPHABETICAL INDEX OF CASES CITED

OTHER CITATIONS

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

An Explanation for the Guidance of the Court

Except for *Item 32* (*Indenture of Coal Lease,* with appended blueprint map, from respondent to Knott Coal Corporation, upon which petitioner strongly relies as showing a deliberate and furtive inclusion of petitioner's tract in its said lease by respondent, and respondent's profit-motive for such inclusion); and sundry other

original exhibits to which the Court's attention is hereinafter especially directed, the exhibits noted as contained in Accopress "Binder A" and "Binder B" and the "Roll" and "Envelope" of "Original Maps" have but little pertinency to this petition and to the Court's consideration of it. These exhibits deal for the most part with the title issue, now definitely adjudicated in petitioner's favor, and with the *quantum* of coal mined from petitioner's land, an issue which is shown to have been subsequently covered by stipulation of the parties. They were transmitted from the District Court in their original form as a concession to economy, and were included in the transcript of record on appeal out of an abundance of caution.

For the greater convenience of the Court in reviewing this cause, and as affording the Court documentary evidence that the respondent, at all times prior to the trespass, had knowledge of petitioner's ownership of the 100 acre tract in controversy and knowingly and deliberately procured its lessee, Knott Coal Corporation, to mine the coal beneath it, petitioner has segregated and identified, in one brown open-edge folder, such of the "Original Papers" and "Original Maps" as are deemed of special significance and pertinency to the points herein relied upon by petitioner, viz:

(a) Original *Cloth Tracing* (taken from envelope of "Original Maps", No. 1) enclosed in letter from C. B. Slemp to Hager & Stewart, Attorneys, dated December 21, 1906 (see letter reproduced in Tr. Vol. III, bot. p. 43), showing manner in which Mr. Slemp proposed at that time that the parties divide the tract in controversy in the *J. R. & M. F. Kelley* v. *R. K. Richards suit* between his company and petitioner's privies in title.

(b) Original Art-Paper Map (same as and contemporary with the foregoing cloth tracing) produced at the trial of this cause from respondent's files by its Chief Engineer and Vice-President, G. Turner Howard, and filed by respondent as "Original Map No. 6".

(c) Respondent's President, W. S. Dudley's folded cloth-mounted copy of the so-called "*Kentucky River Region Map*" (being Original Map No. 17), made in the "Spring—1909", which shows petitioner's 100 acre tract in the form proposed in Mr. Slemp's above mentioned letter and cloth tracing of December 21, 1906.

(d) *Deed* from J. R. & M. F. Kelley to Kentucky River Consolidated Coal Company (one of the Slemp Companies), dated June 8, 1912 (taken from Binder "B" of "Original Papers", Item 51), which conveys the residue of the tract of minerals involved in the *Kelley* v. *Richards* suit after the Kelleys had conveyed to Richard's assignee (Webb & Hoppin, petitioner's direct grantors) by deed dated June 5, 1911 (Tr. Vol. III, p. 22) the 100 acre tract of minerals in controversy in *this* suit.

(e) *Indenture of Lease* from respondent, Kentucky River Coal Corporation, to Knott Coal Corporation, dated March 15, 1921 (taken from Binder "A" of "Original Papers", Item 32).

(f) The *Blueprint Map* appended to and made a part of said indenture of lease. (Original Maps, No. 19.)

(g) *Blueprint Map* showing Knott Coal Corporation's Leasehold and Mine-Workings (taken from "Roll" of "Original Maps," No. 7).

(h) Full length *Blueprint* of respondent's *Fox, Peck & Pursiful Map* (taken from "Roll" of "Original Maps," No. 11).

(i) *Cloth Tracing* given petitioner's Attorney *Tynes* by respondent's Chief Engineer *Howard,* incorrectly

representing no No. 9 coal to be on the tract in controversy.

(j) Petitioner's so-called *"Composite Oral Argument Map"* (used in the oral argument of this cause in the Circuit Court of Appeals), which shows the form and location of petitioner's 100 acre tract, both as originally proposed by Mr. Slemp and as finally conceded and conveyed by the Kelleys to petitioner's direct vendors, Webb & Hoppin, by deed dated June 5, 1911, (Tr. Vol. III, page 22), in settlement of the *Kelley* v. *Richards* suit, in its relation to respondent's adjoining and well nigh encircling lands, and the tunnels driven under the tract by respondent's lessee in the course of the trespass.

(k) The *Bill of Complaint* in the chancery cause entitled *Knott Coal Corporation* v. *Kentucky River Coal Corporation*, filed in the Circuit Court of Richmond, Virginia, in September, 1931, shortly after *this* suit was instituted (Original Papers, item 61).

Attached to the front of each of the foregoing original exhibits (and at the top of each exhibit printed in Tr. Vol. III and herein referred to) is a notation giving the page of Tr. Vol. II where the exhibit was *offered in evidence* and the page (or pages) where the *witness* (or witnesses) *testified concerning* such exhibit.

Proceedings in the District Court

In this suit, originally instituted in February, 1930, by the petitioner (oft hereinafter called "plaintiff") against the respondent (oft hereinafter called "defendant"), Kentucky River Coal Corporation, owner of a large body of coal lands in Eastern Kentucky, and Knott Coal Corporation, which was engaged in mining coal under an indenture of lease from Kentucky River Coal Corporation, plaintiff sought, primarily, to quiet its title to a 100 acre

tract of coal land situate in Knott County, Kentucky, and incidentally to recover from the defendants, inter alia—

(a) Damages for the wrongful, intentional and willful mining and appropriation to their own use 114,000 tons of the No. 9 seam or vein of coal underlying said tract;

(b) Damages on account of having wrongfully mined a large tonnage of the No. 9 seam of coal from the land of others through the mine-entries, tunnels and passage-ways driven by them through and under said tract;

(c) Damages in the amount of double the market value of so much of said coal as had been mined and sold from plaintiff's tract after section 1244a-1 of Carroll's Kentucky Statutes became effective, to-wit, on June 20, 1928.

Defendant's answer to plaintiff's original and amended petitions in equity did no more, insofar as here pertinent, than traverse each and every material allegation of plaintiff's petitions, claiming, nevertheless, title to the tract of land to be in Kentucky River Coal Corporation, with the right on the part of Knott Coal Corporation to mine all the coal underlying the same, through and by virtue of its coal mining lease from Kentucky River Coal Corporation.

At the trial of the cause before the late Hon. A. M. J. Cochran in June, 1931, the court ordered that only the issue of title should be tried at said term, and that all questions of damages should be held in abeyance pending the court's determination as to the ownership of the 100 acres of minerals in question. Accordingly, at that trial only such evidence and exhibits as related to the sole issue of title were introduced, albeit certain testimony

bearing on the nature, extent and quality of the alleged trespass unavoidably crept in.

On the 8th day of July, 1932 Judge Cochran handed down an exhaustive written opinion (Tr. Vol. I, pp. 49-69), in which he *found* and *held* that the plaintiff was entitled to a decree adjudging it to be the owner of the 100 acres of minerals in controversy.

On August 31, 1932, decree (denominated by Judge Cochran as a "final decree") was entered pursuant to the court's written opinion, wherein the court decreed (Tr. Vol. I, pp. 70-72)—

> (a) That plaintiff is the owner of all the coal and minerals of every description under said 100 acre tract.
>
> (b) That plaintiff is entitled to recover against the defendants, and each of them, according to their joint or several liability therefor, whatever damage may be ascertained to have been committed by them, or either of them, upon and under said 100 acre tract, by reason of the trespass described and alleged in plaintiff's bills of complaint.
>
> (c) That the cause be referred to the Hon. John W. Menzies as Special Master to ascertain what damages occurred to plaintiff's property by reason of the trespass set out and alleged in its petition.

Between October 1, 1932 and May 1, 1933 the Special Master held various and sundry hearings, at various and sundry places, when a large volume of testimony on the damage phase was adduced before him by the several parties, including both Kentucky River Coal Corporation and its lessee, Knott Coal Corporation.

Having concluded that the defendant, Knott Coal Corporation, in mining the coal in question from plaintiff's

land was but acting under the sanction of its lease from the defendant, Kentucky River Coal Corporation, whose innocent albeit negligent and careless agent it was, plaintiff on August 7, 1933, before the Special Master had returned his report or indicated to counsel his findings, tendered and asked leave to file its petition to dismiss the cause as to Knott Coal Corporation (Tr. Vol. I, pp. 113-116), which, by order entered on August 23, 1933 was granted (Tr. Vol. I, pp. 123-124). The Special Master, not knowing of the pendency of said petition, had previously completed and placed his report in the hands of the printer; and acting under instructions from Judge Cochran so to do (when, shortly after the tender of said petition by plaintiff, Judge Cochran advised him that the cause was being dismissed as to Knott Coal Corporation), the Special Master on August 11, 1933 filed his report upon the issues as originally made up and developed in evidence against the two defendants in which he found, *inter alia* (Tr. Vol. I, pp. 118-122)—

> "If the Kentucky River Coal Corporation alone was defendant it would be more simple to find a correct basis upon which to fix the damage. Would unhesitatingly find that the trespass was wanton, willful or done with a reckless disregard that amounts to willful trespass."
>
> "*That the Kycoga Land Company tract of one hundred acres occupied a key position, is fully evidenced by the testimony,* and officers of the Knott Coal Corporation admitted that there were millions of tons of coal behind this tract of land that could not be successfully mined except by hauling coal through the Kycoga Land Company tract. The reason for the Kentucky River Coal Corporation not emphasizing the lack of ownership of this (Kycoga) tract of land

at the time of the lease is apparent from the evidence and needs no comment."

"The evidence concerning this trespass resembles the No. 9 seam of coal. It outcrops in so many places in the record that it would be burdensome to refer to each and every out-crop of evidence showing or indicating that the trespass was a reckless one."

"Granting for the sake of argument that the Kentucky River Coal Corporation, or even its President himself, were not fully aware of the fact that the Kentucky River Coal Corporation did not own this tract, it still must be so apparent from a careful examination of the maps and title papers that this fact could have been ascertained by the Kentucky River Coal Corporation, and *its negligence in not discovering the fact that they did not own this particular tract must be considered to amount to a reckless and willful trespass* . . .

"The rule as to damage seems to be well settled, that the price of the coal at the tipple is the correct measure of damage for a wanton and willful trespass, but I cannot make myself believe that it would be fair or equitable to place upon these defendants (i. e. upon *merely negligent* Knott equally with its *willful, wanton* co-defendant), all of the strict penalties under the circumstances in this cause, and on the other hand it would be unfair and unequitable to require the plaintiff to accept for damage the bare ten cents royalty which would be allowed because of an innocent trespass *as the facts in this case do not justify finding an innocent trespass,* as that term is understood. (Phrase in parentheses supplied.)"

"Should the District Court think . . . the strict rule as to wanton and willful trespass should be allowed in this cause, I find in that event that the basic price per ton should be the price received for the coal at the tipple which average price is given by the defendant, Knott Coal Corporation, as $1.56 per ton."

On August 23, 1933 plaintiff tendered and asked leave to file its petition to re-refer the cause to the Special Master, with instructions and directions, *inter alia,* (Tr. Vol. I, p. 125, 126)—

> "FIRST: Ascertain and report back to the court what part, if any, of the testimony, exhibits and other proceedings presented and had herein by Knott Coal Corporation, from the institution of this suit down to the present time, the defendant, Kentucky River Coal Corporation, elects to adopt, have read and to use as a part of its defense to this cause, and what part said defendant does not so elect to adopt, have read and make use of, and conform the transcript of the testimony taken and the exhibits filed herein accordingly, and transmit and report the same back to the Court as a part of his report."
>
> "SECOND: Ascertain and report back to the Court— * * *
>
> "(b) The number of tons of coal mined and shipped by said defendant from plaintiff's tract subsequent to June 20th, 1928, and the damages that have accrued to the plaintiff therefor in the contingency the Court should hold plaintiff entitled to an award for damages under section 1244 a-1, Carroll's Kentucky Statutes." * * *
>
> "THIRD: Revise and extend the report filed by him herein on August 11th, 1933, consistent with the dismissal of this cause as to the defendant, Knott Coal Corporation, and with the testimony and record when conformed by him as specified in Paragraph 'First' hereof, and so as to embody his additional findings of fact as specified and directed in paragraph 'Second' hereof."

Judge Cochran died before acting upon the petition, which was filed (and sustained in part and refused in part) by his successor, the Hon. H. Church Ford, by order

entered on November 18, 1936. (Tr. Vol. I, p. 193).

On September 20, 1933, plaintiff filed exceptions to the Master's reports, which included, *inter alia* (Tr. Vol. I, pp. 140-144)—

> *Exceptions First and Second* (in effect): In that the Special Master, having found and reported that Kentucky River Coal Corporation had knowingly, willfully and wantonly mined, shipped and sold in commerce 114,148.66 tons of plaintiff's coal, computed plaintiff's damages therefor at 56.7 cents per ton instead of the approximately three times greater price for which said coal had been sold on the market.

On January 8, 1934, plaintiff filed its Fourth Amended and Supplemental Bill of Complaint (Tr. Vol. I, pp. 144-148), and on June 26, 1934, its Fifth Amended Bill of Complaint (Tr. Vol. I, pp. 171), so as to make its pleadings conform to the evidence adduced before the Special Master and to the circumstance of the cause having been dismissed as to Knott Coal Corporation.

On the 27th day of August, 1936, Judge Ford (lately Judge of the Circuit Court of Scott County, Kentucky, and but recently appointed to succeed the late Judge Cochran as Judge of the District Court) filed his opinion on the damage issue, (Tr. Vol. I, pp. 174-184) wherein, accepting Judge Cochran's opinion on the tital as final, he *found, inter alia*: (a) "that it can *scarcely be doubted* that *at all times he* (respondent's president, *Dudley*) *knew this* (petitioner's) *land* was *located somewhere within* the vast territory *embraced in the lease*"; (b) that while the record clearly warranted the conclusion that defendant's president "did not exercise due care to ascertain the limits of his company's property *beyond which he should not have permitted the operation of his lessee to go,*" such

conduct was not necessarily inconsistent with an unintentional or inadvertent trespass; (c) that although *"the result of negligence,"* the trespass should not be regarded as "willful" within the meaning of that term as used in the law dealing with trespass; (d) that the testimony indicates that 113,680 tons of coal were mined or caused to be mined by defendant from plaintiff's land; (e) that the record "discloses no satisfactory or practical basis upon which to calculate the value of the coal in place except the customary royalty rate"—that "ten cents per ton appears to have been the customary royalty in that locality as evidenced by the fact that 2,000 acres adjacent to the land in question were leased at that rate"—that "this has long been the established criterion in Kentucky for measuring compensation to the owner for an unintentional and inadvertent invasion of his coal lands;" (f) that inasmuch as the fact of the trespass and conversion of plaintiff's property by the defendant was determined when Judge Cochran entered the decree on the title on August 31, 1932, plaintiff should be allowed interest on the value of the converted property from that date; (g) that "plaintiff's claim to *statutory penalties* must fall *along with its claim for enrichment by way of exemplary damages,* as such statutes are likewise applicable only in cases of willful trespass;" (h) that plaintiff is entitled to recover two cents per ton on the 26,473 tons of coal hauled by defendant from its own lands through plaintiff's tract.

On September 11, 1936, plaintiff filed its petition (Tr. Vol. I, p. 185) wherein it stated counsel's understanding that the Court would hear counsel's oral argument before rendering his opinion; pointed out that the Chancellor's

opinion on the damage phase had been formed from the perusal of a record which did not contain material maps that had been filed and identified for use by the court in deciding the cause and temporarily withdrawn from the record, and without the court having ruled upon various and sundry motions and petitions tendered and/or filed before the late Judge Cochran, a ruling on which is material to plaintiff's cause of action: and *prayed* that the court's opinion be withdrawn; that all proffered motions and exceptions be ruled upon and petitioner given an opportunity to take such steps as it may be advised to take by reason of such rulings; that all the maps and other exhibits which were "identified" for use and were in fact used by the late Judge Cochran and the Special Master be brought before the court, for its use in deciding the issues joined, and made a part of the official record and that the cause thereupon be set down for oral argument upon such date and at such place as may be agreeable to the court. On the same date plaintiff also filed its separate motion (Tr. Vol. I, pp. 189-192) requesting the Court to make specific findings of fact and separate conclusions of law in respect of nineteen distinct specifications.

On November 18, 1936 the Court (by *Ford,* Judge) entered (1) a *nunc pro tunc* order filing the petition tendered before Judge Cochran by plaintiff on August 23, 1933 to re-refer the cause to the Special Master with instructions to conform his report and the record agreeably to the dismissal of the cause as to Knott Coal Corporation, etc., which the court denied in all material respects (Tr. Vol. I, p. 193); (2) an order (Tr. Vol. I, pp. 195-6) filing the petition tendered before him by plaintiff on September

11, 1936, wherein the court, (a) noted the incorporation into the record and consideration by him of certain material maps which he had not seen when writing his final opinion in the cause, and (b) denied plaintiff's motion for oral argument; and (3) an order (Tr. Vol. I, p. 196) filing and denying the motion filed by plaintiff on September 11, 1936, for specific findings of fact and separate conclusions of law, and making the written opinion of the Court a part of the record herein.

On November 18, 1936, final decree was entered by the Hon. H. Church Ford, Judge, in accordance with his opinion (Tr. Vol. I, p. 197), whereby it was adjudged, ordered and decreed, *inter alia,* that plaintiff recover of the defendant—

> First: The sum of ten (10c) cents per ton on 113,680 net tons of coal unlawfully mined by defendant from plaintiff's land, to-wit, the sum of $11,368, with interest from August 31, 1932, at the rate of six per centum per annum.
>
> Second: The sum of two (2c) cents per ton on 26,473 net tons of coal transported by defendant through plaintiff's land, to-wit, $529.46, with interest as aforesaid.

On February 16, 1937, plaintiff filed its petition for appeal to the Circuit Court of Appeals from said final decree, together with its assignment of errors (Tr. Vol. I, pp. 204-211); and an appropriate order granting said appeal was entered (Tr. Vol. I, p. 213).

On February 17, 1937, defendant perfected a cross-appeal from the decrees of August 31, 1932 and November 18, 1936 (Tr. Vol. I, pp. 216-223) on the title issue.

By "Stipulation" entered into on October 15, 1938, when the condensed statement of evidence material to

both appeals was in process of preparation, it was stipulated between the parties, *inter alia,* as follows (Tr. Vol. II, pp. 244-246):

> "1. That the tonnage of the No. 9 seam of coal mined, shipped and sold by Knott Coal Corporation from the 100 acre tract of land in controversy in this cause was 113,680 tons, as determined and found by the District Court in the decree entered in said cause on the 18th day of November, 1936; the cross-appellant, Kentucky River Coal Corporation, having hereby waived and abandoned its assignment of error as to such determination and finding.

The Salient Facts (mostly documentary) Upon Which Petitioner Relied as Showing the Trespass was "Willful," and "Knowingly" and "Intentionally" Committed.

In the fall of 1918, Messrs. L. N. and Hugh Buford (father and son), successful coal operators in the Kentucky River field above Hazard, Kentucky, entered into conversations with Kentucky River Coal Corporation, through its President, W. S. Dudley, of Lexington, Kentucky, with respect to a mining lease on an hitherto undeveloped seam of coal of extraordinary thickness which appears high up in the dividing ridge between the waters of Carr's Fork and Lott's Creek, tributaries of the North Fork of the Kentucky River in Knott County, Kentucky. While the Bufords were given to understand that Dudley's company owned all or certainly the essential acreage of the seam in this dividing ridge, the fact is that at that time said company owned less than two-thirds of such acreage.

During the next two or three ensuing months the Bufords, at the expense of the Kentucky River Coal Corporation, prospected and made an outcrop survey of the

most desirable acreage of the No. 9 seam, which, unknown to them, included various and sundry tracts of land which Kentucky River Coal Corporation did not own, among which was Petitioner's William Kelley one hundred acre mineral tract.

In the spring and early summer of 1919 Mr. Dudley, for his company, made an unsuccessful effort to purchase the one hundred acre William Kelley tract from petitioner, through petitioner's agent and attorney, Buford C. Tynes, for the past eight years a resident of Hazard but who in May of that year had moved to Huntington, West Virginia (see Tynes' testimony, Tr. Vol. II, p. 444). Notwithstanding its inability to purchase the tract, under date of August 2, 1919, Kentucky River Coal Corporation entered into a so-called letter-lease contract with the Bufords (Tr. Vol. III, p. 61) whereby it obligated itself in due season to execute to the Bufords' newly formed mining company, Knott Coal Corporation, a lease on an agreed boundary of land, carrying an acreage of the No. 9 seam selected by the Bufords as being most desirable in thickness of seam and as lending itself to a proper economic development of the seam. The exterior bounds of the tract described in the lease ran up the center of the dividing ridge between Carr's Fork and Lott's Creek, thus making the leasehold what is known as a "split-ridge" mining proposition, by which is meant that the coal seam included in the lease lay on one side only of the center of the ridge—the north side. Petitioner's one hundred acre tract is situate at such a point in the leasehold boundary as to trap off and render unminable and inaccessible (except by entries driven

through, or by outside tramroads constructed on, petitioner's tract of land) more than two-thirds of the No. 9 seam of coal embraced in Knott's Kentucky River Coal Corporation leasehold. (See Original Map No. 7; also testimony of *Hugh Buford,* President, Knott Coal Corporation, at Tr. Vol. II, p. 367, to the effect that his company would not have taken the lease had it known of petitioner's adverse ownership of the William Kelley one hundred acre tract). While this letter-lease contract represented and definitely stated that Kentucky River Coal Corporation did *not* own *three other tracts* which were contiguous to the boundary described in the letter-lease (the No. 9 seam of coal under which the Bufords desired but did not deem essential to the economic development of the leasehold boundary as a whole and which Kentucky River Coal Corporation obligated itself to acquire, if possible, and if acquired to include in the lease) it *definitely and particularly represented* that said company *did* own petitioner's said one hundred acre tract.

By the fall of 1921 Knott Coal Corporation had expended approximately $450,000.00 in the construction of a branch line of the L. & N. Railroad up Yellow Creek to its Kentucky River leasehold, and in the construction thereon of a coal tipple, incline and other facilities for its development, under the authority of its still unrecorded letter-lease contract of August 2, 1919, and was proceeding with the driving of its entries up the dividing ridge toward the tract in controversy. It was not until the 20th day of July, 1922 that it obtained from its lessor and actually recorded in the office of the Clerk of the County Court of Knott County the formal lease (bearing date the 15th day of March, 1921) in conformity

with its executory contract of August 2, 1919. The lease as thus executed and recorded described the leasehold boundary by metes and bounds description which conformed precisely to the general description contained in the executory contract. Attached to the new lease, and made a part thereof, was a blue print map which showed the Kentucky River leasehold boundary to be in one solid tract, shown shaded in red on the map, and the three adjoining non-essential tracts which the lessor undertook to acquire and include in the lease, if possible, shown shaded in yellow (For copy of this lease and accompanying map see Binder "A" of "Original Papers," Item 32; for the exact location of plaintiff's tract within the confines of said leasehold boundary, see Original Map No. 7).

In the early fall of *1922* (1923, as stated in the transcript, is incorrect, as the context clearly shows), Dudley approached Tynes again about the purchase of the tract in controversy, not *eo nomine* but in conjunction with other tracts of Tynes' client, just as he had done in the spring and summer of 1919, and with the same results; and in December 1922 and January and February 1923, Dudley had his trusted land agent and field man of twenty-five years standing, E. C. (Bird) Holliday, communicate with Tynes by letter on the subject of Kentucky River Coal Corporation's purchasing various and sundry tracts and blocks of land from Tynes' client, (See *Tynes'* testimony, Tr. Vol. II, pp. 444, 445; *Holliday's* testimony, Tr. Vol. II, pp. 428-442), instructing him not to divulge to Tynes the fact that he wished to purchase petitioner's William Kelley tract. Following Holliday's approach to him, Tynes wrote Dudley a significant letter of February 3, 1923, (photostatic reproduction of which appears as

"Appendix A" to this Petition and Brief, for an understanding of which the Court should have before it Dudley's paneled Kentucky River Region Map—*Original Map No. 17*) in which he listed certain tracts of his principal, giving the names of the original grantor, the stream upon which situate, the number of acres, and the tract number assigned to the respective tracts upon Dudley's so-called Kentucky River Region map, a replica of which was in Tynes' possession (the tract in controversy being described in paragraph numbered "2nd" of his letter), the sale of which Tynes' letter stated he was prepared to discuss with Dudley on a trip he contemplated making to Lexington on or about February 12th.

On February 23rd (1923) Tynes met Dudley in the latter's office at Lexington, when a long discussion of Tynes' letter to Dudley of February 3rd ensued, in the course of which Dudley identified and noted on his map, with lead pencil "loops", inside of which he placed the initial of Tynes' client, the precise location of petitioner's William Kelley 100 acre mineral tract in controversy (For the original of Tynes' letter to Dudley of February 3rd, 1923, bearing pencil notations contemporaneously placed thereon by Dudley, see Binder "A" of the "Original Papers", Item 33; for Dudley's personal field-copy of the Kentucky Region map, see the clothbound paneled Original Map marked 17; for Tynes' testimony concerning said letter and map, and his said meeting with Dudley, see Tr. Vol. II, p. 445; for testimony of respondent's Chief Engineer and Vice-President, G. Turner Howard, concerning Dudley's notations, see Tr. Vol. II, p. 313). Nothing came of this meeting between Mr. Dudley and Mr. Tynes.

At about October 1, 1926, Knott Coal Corporation extended its mine workings into petitioner's tract of land, and as at about April 1st, 1929, had mined and shipped from said tract *114,148.66* tons of the No. 9 seam of coal (as found by the Special Master, at Tr. Vol. I, p. 122, or *113,680* tons of coal, as incorrectly computed and found by the District Judge at Tr. Vol. I, p. 182, but accepted and agreed upon by the parties in the Stipulation appearing at Tr. Vol. II, p. 244). On April 4th (1929) Kentucky River Coal Corporation notified Knott Coal Corporation to desist from further mining in the tract in controversy. The reason assigned for such notice is not clearly disclosed upon the record but may be correctly inferred from rumors which had become current among the natives of the vicinity that Knott had driven its entries into a tract of land that did not belong to its lessor (See the so-called Hardaway-Buford correspondence, at Tr. Vol. III, pp. 85 to 90). On this same April 4th, respondent's land agent and field man, E. C. Holliday, telephoned from his company's office in Lexington to Tynes at Huntington on the pretext of employing him to write a contract between his company and parties to whom it was selling a large boundary of timber. In an ensuing conversation with Tynes at Huntington, Holliday casually brought up the purchase by his company of an unidentified group of petitioner's mineral tracts in Eastern Kentucky, which Tynes told Holliday he would discuss with Mr. Dudley personally in the near future (Tr. Vol. II, p. 253). Under date of April 11, 1929, Holliday wrote Tynes a further letter about the timber deal, with a significant post-script about the purchase by his company of petitioner's "little scattered mineral tracts we

talked about." (See letter, Tr. Vol. III, p. 69). In due course Tynes met Dudley at Lexington, where it came to light for the first time that the tract in controversy was the real object of this and Holliday's and Dudley's 1919 and 1922-23 contacts with Tynes (See testimony of *Holliday* to such fact, Tr. Vol. II, pp. 428-442).

In view of Dudley's great anxiety to commit Tynes, then and there, to a sale of the tract, and of his offer to Tynes for the tract of a price per acre many times that mentioned on previous occasions, Tynes deferred decision in the matter until he could check up on the information Dudley gave him as to the proximity of the tract in question to the nearest mining development in Kentucky River Coal Corporation's own lands in that general vicinity, which Dudley told Tynes was five or six years in point of time and two miles in point of distance, and verify the map which Dudley had his Chief Engineer, G. Turner Howard, make and hand Tynes there that day which represented, contrary to the fact, that the tract carried no mineable acreage whatever of the No. 9 seam of coal (See *Tynes'* testimony, Tr. Vol. II, pp. 254-258; see said map in Envelope of Original Maps, No. 9). On or about May 8th (1929) Tynes sent Captain Ira M. Nickell of Ashland, Kentucky, petitioner's long-time land agent and local attorney, to verify the information and map given him by Dudley. It was from this investigation made by Nickell of the records of Knott County that Petitioner became apprised for the first time of respondent's lease to Knott, and that its 100 acre William Kelley tract was included in said lease. On the following day Nickell went up on the ground and upon interrogating the natives in the vicinity of petitioner's tract ascertained to his satis-

faction (there were no outward signs of such to be seen, since the tract had been penetrated by subterranean tunnels driven into it from adjoining lands) that Knott Coal Corporation had already penetrated and mined seven or eight acres of plaintiff's No. 9 seam of coal.

On May 15th (1929) Dudley met Nickell and Tynes, at Tynes' request, at the Phoenix Hotel, Lexington, when Dudley, upon being confronted by Tynes with Nickell's discovery, said:

> "That is Knott's funeral, not ours. Knott Coal Corporation had no business going on your tract. Our lease protects us. All we have got to do is pay them back the ten cents we got on that tract and we step out."
>
> —*Tynes' testimony*, Tr. Vol. II, p. 261.

During the next ensuing two weeks after this Lexington meeting between Tynes, Nickell and Dudley, numerous conversations took place and correspondence passed between Mr. Tynes, Mr. Dudley and Mr. Hugh Buford (President of Knott Coal Corporation) respecting the trespass on petitioner's land, and between Buford and Dudley respecting the responsibility and liability of their respective companies on account of the trespass: the latter culminating in a letter from Dudley to Buford under date of June 4, 1929 (Tr. Vol. III, p. 64) which reads as follows (italics and text in parentheses supplied):

"KENTUCKY RIVER COAL CORPORATION
LEXINGTON, KENTUCKY

June 4th, 1929

Mr. Hugh Buford, President,
Knott Coal Corporation,
Lexington, Ky.

In Re: Claim of Webb and Hoppin
(Petitioner's direct grantors as respects the tract in controversy)

Dear Sir:

I am in receipt of your letter of the 25th ultimo regarding the above claim.

By reference to your lease you will find that it does not specifically state that the A. D. Bright (Webb & Hoppin's grantor) tract is included in it, but the description of the outside boundary as set up in your lease does include this tract.

While it is true the tract is included in the outside boundary *this Company never claimed title to this tract,* but it expected or *hoped* to acquire the tract *in which event* it would have been added to your lease.

By reference to your lease, Page 3, first paragraph, you will note the following:

"It being understood and agreed that all the rights and privileges herein granted are, and shall be construed as, limited to such rights and privileges, only as the lessor as owner or grantee posseses, or has the lawful right to grant, and that where the lessor owns the mineral rights only, this lease shall not be construed as leasing or attempting to lease to the lessee any rights or privileges in the surface or timber rights or any rights whatsoever, other than such as are granted unto the lessor in and by the deeds under which it claims the mineral rights."

From this you will note that the rights and privileges granted in the lease are "limited to such rights and privileges only as Lessor as owner or grantee possesses." Consequently *this Company not possessing any rights or privileges so far as the A. D. Bright tract is concerned,* it did not convey or attempt to convey them, even tho the tract is included within the outside boundary of your lease.

By reference to Page 17 of your lease, you will find Article 17, which is a part of the covenants of the lease. This covenant provides that in case of failure of ownership of any of the coals described in this lease, the Lessor will pay back to Lessee a sum equal to 10 cents per ton for all coals mined, to which the Lessor did not have title.

We are willing to comply with the terms of this covenant, as soon as it has been determined the quantity of coal mined from this tract, *to which this company does not have title.*

Your very truly,

(Signed) W. S. DUDLEY,
President.

WSDSCS.

The original of this letter handed to Hugh Buford, in person, June....."

The Kentucky River Coal Corporation had come into being in 1915 as the result of a merger of several corporations which owned extensive lands and minerals in the Kentucky River field and which had common directors and the same president and General Manager—the Hon. C. Bascomb Slemp, who became a director of Kentucky River Coal Corporation. There were filed in evidence in the cause various and sundry deeds through which some one or another of these companies had acquired tracts of land or mineral adjoining the tract in question and which specifically referred to petitioner's

tract as being a tract of "*mineral sold to A. D. Bright,*" petitioner's remote vendor and trustee (See, notably, deed from William Kelley to Hamilton Realty Company, dated December 10th, 1910, Tr. Vol. III, p. 36). At the trial before Judge Cochran on the title issue there was introduced in evidence the record of a suit in equity (which involved the tract of mineral involved in this suit) entitled *John Riley Kelley & Manford Kelley* v. *R. K. Richards* (in whom the legal title to the tract in controversy at the time reposed), instituted in the Knott County Circuit Court on May 16, 1906, which the defendant had removed to the Federal District Court at Catlettsburg, Kentucky, together with certified copies of deeds executed between the parties in 1911 in compromise and settlement of said suit (See *deed* from William Kelley, et. al. to Webb & Hoppin, Richard's direct grantees, Tr. Vol. III, p. 22; *deed* from Arthur D. Bright, Trustee, to John Riley Kelley, et. al., Tr. Vol. III, p. 26; *deed* from John Riley Kelley, et. al. to Kentucky River Consolidated Coal Company, Binder "B" of "Original Papers", Item 51); also a map which the Hon. C. B. Slemp (one of whose companies held options from the two Kelleys and which, according to Judge Cochran's opinion, were the instigators of the Kelleys in bringing the suit, and their advisors in its settlement) had prepared and sent Richards' attorney, Judge John F. Hager, as a proposed basis of compromise and settlement. (See Original Map No. 1). Speaking of this suit, and of the participation in it of Mr. Slemp (as president and general manager of the different companies mentioned, later merged into Kentucky River Coal Corporation, of which he was a director) Judge *Cochran,* in his opinion on the title issue, said:

"The Kentucky River Coal Company and its assignee, the Kentucky River Consolidated Coal Company, were privies to that suit and actual parties to the settlement thereof. They became such because of the fact that they were interested in and parties to the controversy involved therein . . . . Though neither the Kentucky River Coal Company nor the Kentucky River Consolidated Coal Company joined in the deed of the Kelleys to Webb & Hoppin (pendente lite grantees of R. K. Richards) of June 5, 1911, it is exactly the same as if they had done so. They were parties to the contract of settlement, pursuant to which it was made. They instigated and brought it about, and, by reason thereof, acquired the right to the minerals to the 142 acres (which Richards and Webb & Hoppin relinquished to the Kelleys) free from any claim on the part of Webb & Hoppin. The minerals in the 142 acres were accepted in full satisfaction of any liability on the part of John Riley Kelley and Manford Kelley under the contract. Thereupon those contracts (from the Kelleys to the Slemp companies) came to an end, and all rights thereunder ceased to exist"—Tr. Vol. I, p. 67; (text in parentheses supplied.)

Such is but the barest resume of random portions of the documentary evidence upon which petitioner relied to sustain its contention that the trespass was "willful and wanton" so far as Kentucky River Coal Corporation was concerned, as found by the Special Master, and as such is, under the controlling Kentucky authorities, compensatable on the basis of the price at which the coal converted in the course of the trespass was sold in the open market, and was *not* of the so-called "innocent" or excusable" type, where the damages ensuing from the trespass are properly computable on the basis of the value of the coal in place before severance. To have here re-

counted less would have been an omission upon the part of the petitioner to give this Honorable Court a yardstick by which to pass judgment upon the alleged error of the District and Circuit Courts in applying the law of the case to the facts.

In addition to such *basic compensatory* damages, petitioner sought to recover "double the market value" for so much of its No. 9 seam of coal (to-wit: 23,432.86 tons) as was mined after *Carroll's Kentucky Statutes,* Section 1244a-1, became operative.

The Proceedings in the Circuit Court of Appeals

On February 8, 1940, the cause was argued before the Circuit Court of Appeals with three of the five judges sitting, namely, Judges *Simons, Allen* and *Arrant.*

On April 3, 1940, the Court (speaking through *Judge Simons*) rendered its opinion wherein the court—

> (1) *Held,* that the decree entered in the cause by the District Court (on August 31, 1932 by the late *A. M. J. Cochran,* District Judge) on the title issue was a final decree; and that the cross-appellant (the respondent) having failed to prosecute its cross-appeal therefrom, as well as upon the merits of such cross-appeal, same must be dismissed,
>
> (2) *Found,* that in its claim for damages on account of coal mined or caused to be mined by respondent from Petitioner's land in excess of the approximately $12,000.00 awarded Petitioner by the District Court as for an "innocent" trespass, Petitioner "*mainly relies*" upon a punitive Kentucky Statute which the court correctly interprets as making it "a misdemeanor 'if any person shall willfully and knowingly mine or remove coal from the lands or premises of another of the value of $20.00 or more without color of title in himself to the coal so mined and removed', and in addition to a fine to be imposed, provides that

the person guilty of such misdemeanor shall be 'liable in damages to the owner, double the market value of such coal so wrongfully mined and removed,' the term 'person' being defined to include corporations." (Tr. Vol. III, p. 129).

(3) *Recognized,* that according to the findings of the Special Master the trespass was willful, but *Held,* in view of the fact that the order of reference "reserved full power of review and specifically denied any presumption to be attached to the Master's findings . . . . . (that) they were not to any extent binding upon the independent judgment of the (district) court, nor do they bind us. *Atherton* v. *Anderson, 99 Fed. (2d) 883, 890.* This is not to say that inferences may not be indulged in favor of the master's findings in the usual case where there is conflict of direct evidence, and the master has seen and heard the witnesses and the court has not. Compare *Atherton* v. *Anderson, 86 Fed. (2d) 518, 522.* But the master's findings are based wholly upon inference, the reasonableness of which may be as fairly determined by the court as by him, and in this situation any presumption in favor of his conclusions can be of but slight importance. This is particularly true when analysis of his reasoning discloses that he drew no distinction between mere negligence and willful or wanton disregard of others' rights." (Tr. Vol. III, p. 130).

(4) *Found and Held,* that the respondent may not have "exercised due care to ascertain the limits of its property beyond which it should not have permitted the operations of its lessee to go, but this of itself is not necessarily inconsistent with an unintentional or inadvertent trespass"; that under the Kentucky Rule "a trespass if not explained is presumed to be willful, and the duty to show inadvertence, bona fide belief of right is upon the trespasser. *Elkhorn-Hazard Co.* v. *Kentucky River Coal Corp., 20 Fed. (2d) 67 (C. C. A. 6)*; *Kentucky Harlan Gas*

Coal Co., 245 Ky. 234"; that "whether this is of the class of presumptions that are not evidentiary in their nature and so disappear as soon as a reasonable explanation is presented to rebut the facts upon which the presumption is founded. (*Equitable Life Assurance Co. of U. S.* v. *Sieg,* 74 Fed. (2d) 606—C. C. A. 6", or "whether of that class which requires those against whom it is asserted to do more than merely go forward with the evidence, we have no occasion to decide, since under either interpretation we consider the issue as to the willfulness of the trespass *at large upon the proofs.*" (Tr. Vol. III, p. 130).

(5) *Found and Held,* that "whatever may have been the subsequent relations between appellant (petitioner) and appellee (respondent), and between the appellee and its lessee, and whatever the inferences now sought to be drawn from the long series of negotiations, communications and maps" referred to in the testimony, "any determination of the quality of the trespass as willful . . . *must stem from the lease* (of respondent) *to the Knott Coal Corporation, and the circumstances under which it was executed*"; that "whether Dudley, the president of the appellee corporation, knew precisely where plaintiff's one hundred acre tract was located is not clear", but he probably "*did know*" that the tract was "*somewhere within the outer boundary*" of his company's lease to Knott Coal Corporation, "but such knowledge, actual or constructive, is far from sustaining an inference that it was included in the Knott lease with the deliberate purpose that Knott should appropriate coal not belonging to the (its) lessor;" that no inference can be drawn from Dudley's renewal of his efforts to purchase the tract from petitioner, after the trespass had been committed, at a price greatly in excess of that offered plaintiffs in 1919, and from his efforts to keep the fact of the trespass secret from petitioner until he might buy the tract, that his company intended that its lessee, Knott Coal Corpora-

tion, should appropriate petitioner's coal to the benefit and profit of respondent (Tr. Vol. III, p. 132); that "guilty of negligence Dudley may have been in speculating upon his ability to purchase the property . . ., and in failing to follow Knott's operations in the region of plaintiff's land closely enough so as to prevent Knott's entry thereon before he had concluded the purchase of the property, but . . . something more than mere negligence is required to fasten upon the Appellee the penalty of a statute which, by its express terms, is to be imposed not upon negligent trespassers, but upon those guilty of willful or wanton trespass."

(6) *Found,* that the rule in Kentucky is that the measure of damages for an "inadvertent" and "excusable" mining of coal from the lands of another is the value of the coal in place; *Held,* that the trespass in question was inadvertent and excusable under such rule and that the measure of damages for such trespass was the ten cents per ton found by the District Court to be the value of the coal in place before severance; and *affirmed* otherwise the decree of the district court.

On April 3, 1940, decree was entered in said Court consonant with its opinion (Tr. Vol. III, p. 125).

On May 2, 1940, petitioner filed a Petition for Rehearing (Tr. Vol. III, pp. 135-169). After more than five months, to-wit, on October 8, 1940, said petition was denied (Tr. Vol. III, p. 171).

Opinion of Circuit Court of Appeals

The opinion of the Circuit Court of Appeals for the Sixth Circuit rendered in this case is reported in 110 Fed. (2d) page 894, and also appears in Tr. Vol. III, pages 126-134.

The Basis of this Court's Jurisdiction

(1) The date of the decree sought to be reviewed herein is April 3, 1940, (Tr. Vol. III, p. 125); the date of order denying a rehearing was entered on October 8, 1940. (Tr. Vol. III, p. 171).

(2) The jurisdiction of this Court is invoked under the provisions of Section 240, Judicial Code, as amended (U. S. C. A., Title 28, Sec. 347 (a)).

Questions Presented.

The several questions presented are inherent in the reasons relied upon for the allowance of the writ, as next hereinafter stated, and will not be here duplicated.

Reasons Relied on for Allowance of the Writ

Petitioner earnestly contends and respectfully submits that the Writ of Certiorari should be granted to review the decision of said Circuit Court of Appeals for the following reasons:

(1) Said Court has decided important questions of local law in conflict with applicable local decisions, in that

(a) It has disregarded the rule laid down by the Court of Appeals of Kentucky that every trespass is presumed to have been "knowingly" and "willfully" committed unless the trespasser *both allege and prove* such facts as show his acts were *not* "willful" and "knowingly" committed, or were *not* "intentional";

(b) It has interpreted and applied evidence which, under the rules laid down for such interpretation and application by the Court of Appeals of Kentucky (the court of last resort in said State), is uniformly held to constitute a "willful" trespass (compensatory damages for which is the value of the converted coal when sold by the trespasser), to be a trespass of the "inadvertent" and "excusable" type (damages for which is the value of the coal in place before severence by the trespasser);

(c) Said Court, in derogation of petitioner's substantive right to have the damages accruing to it from defendant's trespass measured by the yardstick employed by the Court of Appeals of Kentucky, has, in practical effect (and *ex moro motu*), invoked against petitioner all the elements of an equitable estoppel which, under the rules laid down by the Kentucky Court, defendant must needs have *both alleged and proved* if it would mitigate a trespass otherwise deemed willful or intentional, yet did neither:

with the consequence that said decision of the Circuit Court of Appeals permits the use of one rule of law in like cases if tried in the Federal Court and a different rule if tried in the state courts of Kentucky; and in so doing said court, disregarding the rule laid down by this Court in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, and in numerous other later decisions in which it overruled its decisions in *Swift* v. *Tyson,* 16 Pet. 1, 18, *Black & White Taxicab & Transfer Co.* v. *Brown & Yellow Taxicab & Transfer Co.,* 276 U. S. 518, and other cases, has denied petitioner a right guaranteed it by the Federal Constitution.

(d) While the court in terms recognized these established rules of Kentucky law, and pretended to apply them, in effect it avoided that obligation by drawing from the evidence an inference (contrary to the findings of the Master, and as we contend, contrary to the undisputed evidence) that *Dudley, respondent's president,* entertained no willful purpose to commit the trespass. This conclusion, even if it could be justified, is, we submit, entirely immaterial, for the reason that the uncontroverted documentary evidence shows that the respondent corporation, from its own maps, records, and its privity to the compromise and settlement of the case of John Riley

Kelley & Manford R. Kelley v. R. K. Richards (see p. 24 supra) had, and was held by Judge Cochran in his opinion on the title issue to have had, at all times, full and complete knowledge of the exact location of the tract and its non-ownership thereof; and therefore that its trespass was necessarily intentional and willful.

(e) It has misconceived petitioner's application and restriction of Carroll's Kentucky Statutes, Section 1244(a)-1, which reads—

> "*Unlawfully Removing Coal from Another's Land.* —That if any person shall willfully or knowingly mine or remove coal from the lands or premises of another of the value of twenty dollars ($20.00) or more without color of title in himself to the coal so mined and removed, he shall be guilty of a misdemeanor and shall be fined not less than one hundred dollars ($100.00) nor more than five thousand dollars ($5,000.00), and in addition be liable in damages to the owner, double the market value of such coal so wrongfully mined and removed. The word 'person' as (used) herein shall include firms, associations, partnerships and corporations. (1928, c. 165, p. 555,"

to only so much of said coal (less than one-fourth) as was mined from petitioner's land after that Statute became effective, and has erroneously assumed that petitioner's contention for the f.o.b. value (*single, not* "double"), as being no more than *compensatory* damages for the trespass in question when measured in accordance with the rule laid down by the Court of Appeals of Kentucky, is predicated upon said statute, notwithstanding the fact that over three-fourths of said coal is shown to have been mined before that statute was enacted: failing to take cognizance of the fact that petitioner's claim for the f.o.b. value of the coal is for no more than the compensatory damages awardable petitioner under the long settled case law of Kentucky.

(2) The decision rendered by said court is in conflict with the decision of other Circuit Courts of Appeals, in that it has adopted and substituted the finding of the District Judge in respect of the one important controlling issue of fact (namely, the quality of respondent's trespass) for the *contra* finding of the Special Master before whom such witnesses testified, at numerous hearings extending over a period of seven months, and who, as the Clerk of his court (from 1901 to 1929) during Judge Cochran's incumbency as District Judge, had come to know personally every witness who testified upon such issue, and who had been appointed by Judge Cochran as Special Master in this cause because of such circumstance—and because of the magnitude and controversial nature of the issues involved.

(3) Said court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the District Court, in respect to the foregoing and other matters of equal interest and importance, as to call for an exercise of this Court's power of supervision.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

LEGAL POINTS AND AUTHORITIES

POINT I.

In Kentucky a Trespass is Presumed to have been Willful Unless and Until Proven by Substantial and Satisfying Evidence to have been Otherwise; and the Burden of Such Proof Rests Upon the Trespasser.

An early leading Federal case on this point is *Liberty Bell Gold Mining Co.* v. *Smuggler-Union Mining Co.*, 203 F. 795, 122 C. C. A. 113, which *holds*:

> "Intent, being a state of the mind, can but seldom be proven by direct evidence. For this reason the law presumes that a party intended the natural consequence of his acts, and if a person *has the means of ascertaining facts,* but *refuses to use these means,* and, *reckless of the rights of the true owner,* appropriates his property to his own use, the law will *presume* that he did it *intentionally* and *willfully.*"

In *Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corporation,* 20 F. (2d) 67, C. C. A. 6th Ct., the court, speaking through the late Judge *Westenhaver,* then District Judge, has this to *say*:

> "The Court below was right in holding the trespass was not innocent or inadvertent or unintentional. If the trespass is wrongful, nothing else appearing, it will be presumed to be willful. The duty is cast upon the trespasser to explain his conduct and to show it was inadvertent or unintentional or under a *bona fide* belief of right. See Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (8 C. C. A.) 129 F. 668, 669; Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co. (8. C. C. A.) 203 F. 795-802, etc."

A leading case of the Court of Appeals of Kentucky on this question is *Griffith et al.* v. *Clark Mfg. Co. et al.*, 279 S. W. 971, 212 Ky. 498, where the Court *says*:

> "One is presumed to have intended the reasonable and natural consequences of his acts, and his denial of such an intention is not conclusive, if the act was done *recklessly* OR *wantonly*, or under circumstances warranting a different conclusion."

In Kentucky Harlan Coal Co. v. *Harlan Gas Coal Co.*, 245 Ky. 234, 53 S. W. (2d) 538, 542, in the first paragraph of section 10-12 of the opinion, the Court of Appeals of Kentucky, speaking through *Richardson*, Judge, has this to *say*:

> "To bring himself within the rule controlling a claim against a trespasser for damage committed by him by an 'innocent mistake', as this term is applied in such cases, the trespasser *must allege and prove such facts* as will *show his acts were not* 'willful and knowingly committed', or not 'intentional'."

(This *Kentucky Harlan* and other cases on this point will be found cited and applied to the facts of the case in suit in petitioner's Petition for Rehearing of the cause by the Circuit Court of Appeals, Tr. Vol. III, from near bot. of p. 130 to mid. of p. 140).

The holding in *Kentucky Harlan* v. *Harlan Gas* remains the settled law in Kentucky on this valuable *substantive right* of Petitioner. Cf. *Cities Service Oil Co.* v. *Dunlap*, 304 U. S. 202; *Ruhlin* v. *N. Y. Life Ins. Co.*, 304 U. S. 261; *Hudson* v. *Moonier*, 304 U. S. 397; *Wichita Royalty Co.* v. *City Nat'l. Bank*, 306 U. S. 193, cited in the Petition for Rehearing of this cause, Tr. Vol. III, p. 136.

POINT II.

In Kentucky The Measure of Damages for the Willful Conversion of the Coal of Another is the Market Value of the Coal After Conversion, or the Price at which Sold by the Trespasser.

So thoroughly is this proposition established in the State of Kentucky and in our jurisprudence generally that we shall cite but a few of the myriad cases that record and expound it, selecting from the great horde of decided cases those in which the facts are most nearly similar or analogous to the facts in suit.

Liberty Bell Gold Mining Co. v. *Smuggler-Union Mining Co.*, 203 Fed. 795, C. C. A. 8th Ct., is a case in which the facts are a well-nigh perfect paraphrase of certain facts in the instant case. The plaintiff and defendant had certain negotiations for an exchange of ore-bearing lands during which the president of the defendant company attempted to work out with the president of the plaintiff company an exchange for the land trespassed upon without divulging to the president of the plaintiff company the fact that the trespass has been under way for about two years. In this connection defendant's president had shown plaintiff's president a map of defendant's mine development, but the map failed to disclose any or all of the pertinent facts. Somewhat later defendant's president did tell plaintiff's president that they were near his line but made no intimation whatever that actual mining of plaintiff's land was under way.

Syllabus 1 of the *Liberty Bell* opinion *holds*:

> "*Syl. 1.* In an action to recover damages for a wilful and intentional trespass to mining property by removing and converting ore therefrom, it was not error for the court to instruct that the higher

measure of damages should be allowed if the jury found that the ore was '*recklessly*' taken, since if defendant, *with the means of ascertaining that it was the property of plaintiff refused to use such means,* and in reckless disregard of the rights of the true owner appropriated it, *the law will presume that it was done intentionally and wilfully.*"

In *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, 129 Fed. 668 C. C. A. 8th Ct., *Judge Sanborn,* at page 680 of the opinion, says:

> "An intentional *or reckless omission* to exercise care to ascertain the boundaries of his victim's land or rights, for the purpose of maintaining ignorance regarding them, *or a reckless disregard* of them, *is as fatal* to the claim of a trespasser to limit the recovering of damages against him to the lower measure *as an intentional and willful trespass.*"

In *Pan Coal Co.* v. *Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S. E. 226, a leading West Virginia case on this point, the court *holds*:

> "*Syl. 9*: In an action for the recovery of the value of coal mined by a trespasser, the damages therefor are *compensatory only,* whether the trespass be innocent or willful. The disallowance of labor and expense in case of willful trespass, is not based on the ground of allowing plaintiff *exemplary* or *punitive* damages, but on the principle that one who willfully commits a wrong is not entitled to profit thereby while the *innocent* trespasser, *who in good faith* has improved the property has acquired a certain right in it, and is entitled to credit for the value added thereto at his expense, whenever the plaintiff asserts his rights to the property."

In *American Sand & Gravel Co.* v. *Spencer,* 103 N. E. 426 (Ind. 1913) after finding the trespass in question to have been committed knowingly, willfully or recklessly

and awarding damages at the market value after conversion, the court *says*:

> "(9) Appellant insists that the trial court evidently assessed exemplary damages against it, and that in so doing the court erred. A sum assessed as exemplary damages is a sum in addition to compensatory damages. The amount of *compensatory damages in a given case is determined by recourse to rules of law for measuring damages,* while the amount of exemplary damages, where such damages may be assessed, rests in the sound discretion of the jury, guided by proper instructions given by the court, or in the sound discretion of the court, where the court tries the facts. It is evident, from what we have said, that *we have considered the question of the amount of the judgment in the case only from the standpoint of compensatory damages.*"

North Jellico Coal Co. v. *Helton,* 187 Ky. 394, 219 S. W. 185, an early Kentucky case on this point, *holds*:

> "*Syl. 4*: Where coal is taken from another's land, and the trespass is willful, and not the result of an honest mistake, the measure of damages is the value of the coal mined at the time and place of its severance, without deducting the expense of severing it."

In *Griffith* v. *Clark,* 212 Ky. 498, 279 S. W. 971, section 4 of the opinion, the court, in citing with approval the excerpt above quoted from *Liberty Bell Gold Mining Co.* v. *Smuggler-Union Mining Co., says*:

> "One is presumed to have intended the reasonable and natural consequences of his acts, and his denial of such intention is not conclusive, if the act was done *recklessly* OR *wantonly,* or under circumstances warranting a different conclusion. It is rarely possible to contradict an affirmed intention otherwise than by the actions of the party, and such actions, where not reasonably consistent with the affirmed intention, are

always admissible to contradict it in any character of action."

In *John's Run Coal Co.* v. *Little Fork Coal,* 3 S. W. (2d) 623, 223 Ky. 230, Judge *Willis,* in subdivisions (6-8) of the opinion, states the Kentucky rule thus:

> "The rule prevails in this state that where one trespasses upon the lands of another and takes his property, he is liable in damages therefor. The measure of damages, if the trespass is intentional, *and without claim or color of right made honestly and in good faith,* is the market value of the mineral mined, without any allowance for the expense of mining."

Jim Thompson Coal Co. v. *Dentzell,* 216 Ky. 160, 287 S. W. 548, *holds*:

> "*Syl. 1*: Where mineral in place is willfully mined and removed without knowledge or consent of owner, his measure of damage is market value at place where it was taken without reduction for cost of mining."

In the case of *Elkhorn-Hazard Coal Co. et al.* v. *Kentucky River Coal Corporation,* 20 Fed. (2d) 67 (C. C. A. 6th Ct.—Ky. 1927) appellants had entered upon and mined approximately 6,000 tons of coal from appellee's tract of land in Letcher County, Kentucky, in reliance upon a written offer of lease, manually delivered by the president of the appellee to an officer of appellant, and the written acceptance thereof duly deposited in the mail by appellants and addressed to appellee at Lexington, accepting said offer of lease. The president of Kentucky River Coal Corporation testified that his company had never received the alleged U. S. post acceptance of the offer of lease. Appellee contended that even though said acceptance had been mailed, since the past had been se-

lected by appellants and not by appellee as the agent for transmitting the written acceptance of appellant's manually delivered offer of lease, it was incumbent upon appellant to prove the delivery of said acceptance to appellee, and that even though said acceptance on behalf of appellants had been received by appellee, the executory agreement for lease on the lands trespassed upon was not assignable by the corporate appellant to its co-appellants, Pursifull and Gorman, by reason of the fact that under appellee's standard form of coal lease, which was well known to all the appellants, the leasehold evidenced by the executory contract of lease was not assignable, save with the written consent of appellee which was neither given nor sought by any of the appellants. Notwithstanding the ameliorating circumstances otherwise, the court sustained each and all of the contentions of the appellee, and gave judgment against appellants for approximately $1.65 per ton for the coal mined by them from appellee's land, that price being the f. o. b. price at which the testimony showed said coal was sold by appellants.

Says Judge *Westenhaver,* district judge, sitting with circuit judges *Denison* and *Moorman,* in sections (9-11) of the court's opinion in the *Elkhorn Hazard* case:

> "The Court below was right in holding the trespass was not innocent or inadvertent or unintentional. If the trespass is wrongful, nothing else appearing, it will be presumed to be willful. The *duty is cast upon the trespasser* to explain his conduct and to *show* it was inadvertent or unintentional or under a bona fide belief of right. See Resurrection Gold Mining Co. v. Fortune Gold Mining Co. (8 C. C. A.) 129 F. 668, 669; Liberty Bell Gold Mining Co. v. Smuggler-

> Union Mining Co. (8 C. C. A.) 203 F. 795, 802; Central Coal & Coke Co. v. Penny (8 C. C. A.) 173 F. 340, 344. . . . Appellants, including Gorman and Pursifull, were not acting under any mistake of fact, which, if they believed to be true, *might* induce *a good faith belief* that they had a right to take possession and remove coal. *No good faith effort was made to assure themselves that they had such a right.*"

As in *Pan Coal Co.* v. *Garland Pocahontas Coal Co., American Sand & Gravel Co.* v. *Spencer, Jim Thompson* v. *Dentzell, and Elkhorn-Hazard Coal Co.* v. *Kentucky River Coal Corp., supra,* so in the case at bar, the question of what is or is not compensatory damages is determined by recourse to the Kentucky and analogous federal court cases and established rules for measuring damages; and under such rules, upon the facts of the instant case the value of the coal when loaded on cars in the final act of its conversion is no more than compensatory damages; and being *compensatory,* not punitive, such damages are awardable by a court of equity no less than by a court of law.

Nowhere is this question found discussed with more clarity than in *Trustees of Dartmouth College* v. *International Paper Co.,* 132 Fed. 92, 95, where the late Judge *Lowell* expounds the underlying philosophy of the rule thus:

> "If the defendant's admitted conversion was the result of inadvertence or mistake, it is liable only for stumpage, or at most for the value of the logs immediately after their cutting. If the conversion was willful, the defendant is liable for the value of the goods, however improved. . . . The distinction between the two measures of damages is spoken of in

some opinions as one between damages compensatory and damages exemplary. The second measure is sometimes described as if imposed by way of punishment. . . . *But the analogy is misleading,* as appears from this consideration, among others: The second measure of damages is imposed only where the property converted has been enhanced in value. The defendant's bad faith would be the same had the logs been burned, or converted into pulp, and exemplary damages would be the same in both cases; but in the former case no more than their value before burning could be recovered in this action. From one point of view, indeed, the higher measure of damages gives no more than compensation. If the wrongdoer's improvements belong to the original owner, the latter gets no more than compensation when their value is awarded to him. As between the two measures of damages, *the choice depends upon the plaintiff's unqualified ownership* of the property as improved by the defendant's labor. *If this unqualified ownership exists, the higher measure of damages gives no more than compensation for a legal wrong.* If the defendant, by his labor, has gained a right of property in the goods he has converted, the damages should be computed by a lower measure."

None of the Kentucky cases hereinbefore or hereinafter cited have been modified, limited or restricted by the Court of Appeals of Kentucky.

POINT III.

Both the District and Circuit Court Disregarded the Rule of Law in Kentucky that One Who Trespasses upon Land of Another Must, in Order to avail Himself of an Estoppel, Both Allege and Prove Facts Relied Upon as Constituting Such Estoppel, and Disregarded, Also, Certain Fact-controlled Decisions of This Court.

Out of deference to brevity the Court is respectfully referred to pages 14-16 of petitioner's Petition for Rehearing of the cause by the Circuit Court of Appeals (Tr.

Vol. III, pp. 148-150) for excerpts from the opinion of that court, and to the "Appendix" to such petition (*Idem*, 153-169) for excerpts from the opinions of both the District and Circuit Courts, which serve to demonstrate that both courts cast their conclusion (that the trespass was of the "excusable" type) upon the theory that petitioner estopped itself in some way from claiming damages on the basis of a *willed* and *intended* trespass. The *evidence* on this score (being all such), reviewed at some length in said "Appendix", will be found to justify no such conclusion. But granted, *arguendo*, that it *does* do so: Under the controlling Kentucky cases (found cited in said "Appendix"), having neither alleged nor proved facts constituting an estoppel (indeed, not having so much as even indirectly raised the point in its briefs and arguments, in either the District or the Circuit Court; the question having been raised for the first time upon the court's own motion) respondent may not avail itself of the principle and incidents of an equitable estoppel as mitigating the damages awardable petitioner for a trespass presumed by the law of Kentucky to have been intentional, and conclusively shown to have been predetermined upon by respondent.

The obligation of respondent both to allege and prove the facts relied upon as estopping petitioner from claiming the higher measure of damages is a part of the substantive right vouched-safe petitioner by the case law of Kentucky, and guaranteed to it by the Federal Constitution.

Erie Railroad Co. v. *Tompkins, supra.*
Cities Service Oil Co. v. *Dunlap, Supra.*

See also, on the question of what is and what is not an estoppel, *Brant* v. *Va. Coal & Iron Co.*, 93 U. S. 326, 337,

where this Court, speaking through *Mr. Justice Fields, said*:

> "It is also essential for its (an estoppel's) application with respect to the title of real property that the party claiming to have been *influenced by* the conduct or declarations of another to his injury *was himself not only destitute of knowledge* of the true state of the title, *but also of any convenient and available means of acquiring such knowledge.* Where the condition of the title is known to both parties, or *both* have the *same means of ascertaining the truth, there can be no estoppel.* Crest v. Jack, 3 Watts, 240; Knouff v. Thompson, 4 Harris, 361." (Italics supplied);

and *Crary* v. *Dye,* 208 U. S. 515, 521, where this Court, speaking through *Mr. Justice McKenna,* somewhat more appositely said:

> "2. The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his *silence* or *conduct upon which another has acted.* There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. Brant v. Virginia Coal & Iron Co., 93 U. S. 326; Hobbs v. McLean, 117 U. S. 567. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been *destitute* of *knowledge* of the *true state of the title,* but *also* of any *convenient and available means of acquiring knowledge.* Where the condition of the title is known to both parties, *or have the same means of ascertaining the truth,* there can be no estoppel. Brant v. Virginia Coal & Iron Co., supra." (Italics supplied).

The Court will find that *Crary* v. *Dye* deals with a situation peculiarly like that disclosed upon the record of the case in suit and colorfully demonstrates that the way

out for the transgressor *via* an estoppel *in pais* is hard indeed.

POINT IV.

Both the District and Circuit Court Erred in Failing Properly to Apply the Principle of Corporate Knowledge.

The authorities uniformly hold that a trespass on the lands of another is a legal wrong regardless of knowledge, motive or intent of the trespasser. This rule no doubt has its basis in the public necessity for protecting the rights of property and relieving the courts from the necessity for inquiring into the intentions, purposes, or mental condition of the trespasser. A trespass upon land, accompanied by the converting into personalty of a portion of the land, such as timber or coal, and carrying it off, is presumed to be willful. In such case the owner, of course, has the right to retake his own property or recover it in an action of replevin. If the trespasser has parted with possession of the property, the owner has a right of action in conversion, and the measure of his damages is the value of the severed property at the time of its ultimate appropriation. This is not punitive damages in any sense, but merely the value to the owner of his own property (See opinion of *Judge Lowell* in the *Dartmouth College*, the *Pan Coal Company* and the *American Sand & Gravel* cases, *supra*). However, in mitigation of the severity of this rule, in case of an innocent trespass the measure of damages is stated to be the value of the property before severance.

Heretofore we have argued this case on the same premises that were adopted by the District and Circuit Court (and by the Special Master, for that matter, in reaching his contra conclusion, as if the decision of the

question whether the trespass was innocent or whether willful, wanton or reckless, is to be determined by the knowledge and state of mind of the individual who happened to be the president of the defendant company, Mr. M. S. Dudley. However, we submit that that is not the proper method of approach. The state of mind of Mr. Dudley, the individual, cannot determine the question of corporate knowledge, simply by reason of the fact that he held the office of president. Another individual might have been president of the defendant company and have had no hand whatever in the transaction.

The Court is not advised by any production of the charter or by-laws of the defendant company that its Board of Directors even attempted to limit control and responsibility respecting its property to its president or to Mr. Dudley as an individual. As a matter of fact, its Vice-President and Engineer, G. Turner Howard, and also its agent, Bird Holiday, and no doubt others, took part in its operations and business and had custody of and access to its deeds and records. It is difficult to perceive how a trespassing corporation can overcome the presumption of willful trespass, so as to reduce the damages, when it, as a corporation, had at all times among its records title deeds showing the actual location and lines of its own and adjoining properties. And even if every single officer of the corporation should swear that he had no knowledge, and if that could be believed, we submit that this does not constitute proof of corporate ignorance and innocence.

Surely a trespassing corporation does not overcome the presumption of willful trespass by proving that some particular one of its numerous officers, engineers and

agents lacked knowledge, or had for the moment forgotten and acted under a momentary mistake of fact. To do so it certainly must go to the extent of proving that *none* of its officers, engineers or responsible agents *had ever* had knowledge, and that for the lack of such knowledge the corporate action was taken in an excusable because affirmatively well-founded mistake of fact. No attempt was made by defendant to establish such corporate innocence in this case. The record shows that the District Judge and Circuit Court of Appeals no less than the Respondent relied solely on Dudley's statement regarding his own immediate state of mind.

Here again do we respectfully refer the Court to our Petition for Re-hearing by the Circuit Court (Tr. Vol. III, commencing near bot. of page 144) for a somewhat fuller discussion of "corporate knowledge", and its incidents in the law of trespass, to which the foregoing is by way of a prelude condensed from petitioner's therecited "Typewritten Reply Brief", and for a summary of but a small part of the evidence that constitutes the basis of our argument.

POINT V.

Under the Circumstances Obtaining, the Circuit Court Should have Given the Findings of the Special Master Presumptive Effect Over the Contra Findings of the Trial Judge.

The presumptive effect that is given by appellate courts to the Chancellor's findings of fact has its basis in the circumstance that it has observed and heard the witnesses testify and, therefore, is in a favorable position to judge of their credibility; and so in the case of the findings of a special master. From this derives the salutary rule that ordinarily concurrent findings of master

and chancellor should not be and are not set aside except for clear error.

Cleveland Trust Co. v. *Schriber-Schroth Co.*, 92 F. (2d) 330 (C. C. A. 6th Ct); *Atherton v. Anderson*, 86 F. (2d) 518 (C. C. A. 6th Ct.).

In *Tilghman v. Proctor*, 125 U. S. 136, this Court *said*:

> "The conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part."

In *Adamson* v. *Gilliland*, 242 U. S. 350, at page 353, the rule was stated by this Court as follows:

> "So far as the finding of the master or *judge who saw the witnesses* 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 39 L. Ed. 289, 291".

In *Lake Erie & Western Railroad Co.* v. *Fremont*, 92 F. 721, 731 (C. C. A. 6th Ct.) the court, speaking through Circuit Judge *Taft*, used the following language:

> "The witnesses came before the master. He . . . had a much better opportunity than the court below or this court to judge of the weight to be accorded to the evidence of each witness. It is a settled rule in the federal courts that, in dealing with exceptions to a master's report, the conclusions of the master, depending upon conflicting testimony, have every reasonable presumption in their favor."

In *Brislin* v. *Killana Holding Corporation*, 85 F. (2d) 667, 669 (C. C. A. 2nd Ct.), the court, by Circuit Judge *Swan, says*:

"The issues turn on conflicting testimony where credibility must be the determining factor. Under such circumstances it is axiomatic that an appellate court will not reverse the findings of judge or *master who heard and saw the witnesses* unless the error is *clear beyond dispute.*"

But what presumptive effect shall be accorded the findings of fact of the special master who heard and observed each of the witnesses testify, and had for many years known nearly all and who himself interrogated several of them on the most controversial fact (the quality of the trespass), where, as in the instant case, the Chancellor, who enjoyed none of these opportunities to judge their credibility, makes findings of this one material and essential fact exactly contrary to that of the Special Master?

This precise query is answered in *Roberts* v. *Southern Surety Co.*, 33 F. (2d) 501 (C. C. A.—N. C.), which *holds*:

"*Syl. 1*: Where the findings of special master were reversed by trial judge, Circuit Court of Appeals is *under duty to examine evidence and determine facts for itself giving due weight to findings of master who saw witnesses*:"

Says Circuit Judge *Northcott* in the *Roberts* case, in first reviewing and then applying the holdings of the Federal Courts, both District and Circuit, on this question:

"Findings of fact by a master may not be set aside, in the absence of convincing evidence to the contrary. *Curtice Brothers Co.* v. *Barnard* (C. C. A.) 209 F. 589.

"The finding of a tribunal, whether it be a master, a referee, or a judge, who sees and hears the witnesses and is in the environment of an oral hearing,

is entitled to great weight, and great caution should be exercised by any tribunal having the authority, or being under the duty to review such finding, in disturbing it. *Fernarld Woodward Co.* v. *Conway Co.,* (D. C.) 229 F. 819.

"Where there is a real or apparent conflict between findings of master and those of trial court, appellate court has duty to examine evidence and determine facts for itself. *Armstrong* v. *Lone Star Refining Co.* (C. C. A.) 20 F. (2d) 625.

"That the master, whose findings were set aside by the trial court, heard and saw the witness who testified, cannot be disregarded on appeal from *the decree entered by the court* on *its* findings. *Dorrance* v. *Dorrance* (C. C. A.) 264 F. 54, certiorari denied 254 U. S. 654.

"In the instant case it would, therefore, seem to be the duty of this court to examine the evidence offered and determine the facts for itself, bearing in mind the proposition above laid down, to wit: That the master whose findings were set aside, heard and saw the witnesses who testified, and his conclusion cannot be disregarded on appeal."

Says Circuit Judge *Kohlsaat,* in writing the opinion of the court in *Curtice Brothers Co.* v. *Barnard, supra*:

"The voluminous record of this case deals largely with . . . . a question of fact. The finding of fact of the master may not, in the absence of convincing evidence to the contrary, be set aside. *To show that the report is erroneous and not justified by the evidence, the burden rests upor the appellant."* (Appellee in the instant case).

And what of the situation where, as in the instant case, the order of reference to the special master expressly stipulates that—

"The findings which he shall make shall not be final or given any presumptive effect, but the ques-

tion as to all such shall be open for determination by the Court as if no findings had been made"?

Nowhere have we found this proposition so clearly stated and so convincingly answered as in *Atherton* v. *Anderson, supra,* where the Court, speaking through Circuit Judge *Simons, says*:

> "It is urged, however, that since the order of reference recited that the report of the master was to be advisory only, little weight need be given his findings. To what extent this weakens the presumption of correctness that attaches to them would be difficult to say. Certainly the court must even in such circumstances consider the superior opportunities of the master who heard and saw the witnesses to appraise their credibility and to harmonize conflicting testimony. In practical application perhaps there is little difference between saying the master is presumptively correct and saying that his findings are purely advisory, especially when as here the master is specially selected for exceptional ability to aid the court in a peculiarly complicated and difficult case. His advice is not lightly to be rejected, whatever the formula."

Thus does it appear that the fallibility, or not, of the master's findings is to be tested not by would-be limitations imposed by the order of reference upon the presumptive effect to be given such findings, but by the practical likelihood that his findings are correct or incorrect. In the instant case the master, prior to his elevation to the Clerkship of the Circuit Court of Appeals of the Sixth Circuit, had for twenty-eight years been the Clerk of that emminent mountain-land lawyer and jurist's, District Judge Cochran's Court and had served as special master for Judge Cochran in more than a score of cases. Throughout that time he had been personally acquainted

with practically every person who had a part in the making of the record in this case, whether as litigant, attorney or witness, and during the numerous hearings before him had every opportunity to evaluate their testimony, and where any such was doubted to judge of the witness' credibility. To supplant his findings as to the one controlling fact of the case (the *quality* of the trespass, whether willful and inexcusable or unintentional and excusable) for the contra finding of the newly appointed low-land district judge, arrived at from the mere reading of the testimony of witnesses whom he did not know and had not heard testify, either in this or any other case, because of the "formula" prescribed by the order of reference, is, we earnestly urge, but to put the shadow above the substance of things real.

The cases thus far cited on this point serve to show that the decisions of the Circuit Court of Appeals of the several judicial circuits, ruled, as they were, upon a variety of facts and circumstances, are not in accord as to the effect to be given the findings of the Special Master under the peculiar circumstances that obtain in this case. *Compare*, also:

Vann v. *Almours Securities,* 96 F. 2d 214 (C. C. A. 5th Ct.)

Stearns v. *Central Petroleum Co.,* 93 F. 2d 638 (C. C. A. 10th Ct.)

Wilson-Western Sporting Goods Co. v. *Barnhart,* 81 F. 2d 108 (C. C. A. 9th Ct.)

In Re: *Turley,* 92 F. 2d 944 (C. C. A. 7th Ct.)

Nor has this Honorable Court directly ruled upon the point when so circumstanced: a fact, we submit, which calls for an exercise of the Court's discretion to review the decisions of the District and Circuit Court of Appeals,

and elicits its general power of supervision over those decisions.

POINT VI.

Respondent's Motive and Purpose in Mining Coal from Petitioner's Land, and its Liability Therefor, stem from its Lease to its Lessee, Knott Coal Corporation.

In its opinion (Tr. Vol. III, p. 131) the Circuit Court of Appeals said:

> "Whatever may have been the subsequent relations between appellant and appellee, and between the appellee and its lessee, and whatever the inferences now sought to be drawn from the long series of negotiations, communications and maps, any determination of the quality of the trespass as willful and prompted by a deliberate purpose of the appellee that its lessee should appropriate the appellant's coal to its profit of 10 cents a ton royalty, must stem from the lease to the Knott Coal Corporation, and the circumstances under which it was executed."

That a lessor who includes in a coal lease to his lessee a tract of coal land owned by another is liable, jointly with his lessee, for coal mined and removed by his lessee therefrom, is the holding of the Court of Appeals of Kentucky and of the courts of last resort of numerous other states. In the determination of this joint liability the legal relationship between lessor and lessee is deemed to be that which obtains between principal and agent. The doctrine has its foundation in the principle that the lessor, having authorized, encouraged and procured the acts constituting the trespass to be committed by its lessee, thereby making its lessee its own agent, becomes bound as principal for all damage resulting from the execution of the agent's undertaking, and as such must respond under the rule of *respondeat superior*.

An early case from other jurisdictions in which the doctrine obtains, and one frequently referred to in the later cases arising in Kentucky and other states, is *Donovan* v. *Consolidated Coal Co.*, 187 Ill. 28, 58 N. E. 290, 29 Am. St. Rep. 206. We quote the pertinent *syllabus* of the case as follows:

> "*Syl. 1*: One who knowingly authorizes a company to mine for the coal of a third person, and the company takes it and pays him therefor, is liable as a trespasser, *though he did not participate in mining the coal otherwise than by making the contract under which it was dug.*"

One of the best considered Kentucky cases in which this doctrine has been applied is *Blackberry, Kentucky-West Virginia Coal Co.* v. *Kentland Coal & Coke Co.*, 225 Ky. 346, 8 S. W. (2d) 425, where the court *held*:

> "*Syl. 5*: Where landowners erroneously included in their lease for mining purposes 80 acres of land belonging to another, and the lessee, in ignorance of this fact, mined such lands, *held,* in action for recovery for trespass, that such lessors of the 80 acres were liable to the real owners thereof for *having contributed* to the lessee's trespass, although lessors were innocent of willfully leasing lands of another."

Another leading Kentucky case on this doctrine is *Thompson et al.* v. *Dentzell et al.*, 232 Ky. 755, 24 S. W. (2d) 607 (which is a later edition of *Jim Thompson Coal Co.* v. *Dentzell,* 216, Ky. 160, 287 S. W. 548) in which the court *held*:

> "*Syl. 2*: In suit to enjoin trespassing and mining coal upon complainant's land, where offending company, as lessee, was induced to trespass by misrepresentations on part of lessor's agent, both lessor and agent, as well as company itself, are responsible for coal mined."

The doctrine is enunciated nowhere quite so clearly as in *Kentucky Harlan* v. *Harlan Gas Coal Co.,* 245 Ky. 234 (1932) 53 S. W. (2d) 538, where the Court of Appeals of Kentucky, speaking through *Richardson,* Judge, in the closing paragraph of 10-12, of the opinion, states the principle involved thus:

> A lessor who by his lease *vests the right or privilege* in a *lessee* to mine or cut timber on land covered by his lease, reserving in himself the right to a royalty, or a portion of the proceeds, occupies a different position in relation to a trespass committed by the lessee on adjoining lands in virtue of a lease from that of a *grantor* who by his deed *vests the title in fee* in his *vendee* and thereby severs absolutely all his interests, right, and title in the property conveyed. *Under such lease there exists and continues between the lessor and lessee or his assignee, during the life of the lease, the relations of principal and agent,* and, if the lessee or his assignee commits a trespass on adjoining land in the execution of the lease, he is deemed the agent of the lessor in its commission, and the law implies that, in the commission of the trespass, the lessee, or his assignee, by virtue of the lease, was *authorized, encouraged,* and *procured by the lessor* to commit it. It is on this theory that the lessor in such case is liable for trespass committed by the lessee or his assignee on adjoining lands, when executing or carrying out the provisions of the lease.'' (Italics supplied).

The latest Kentucky case in which this doctrine is given even fuller consideration and acceptance is *Davis* v. *Kentland Coal & Coke Co.,* 247 Ky. 642, 57 S. W. (2d) 542, which is a re-appearance of *Blackberry, Kentucky* v. *Kentland, supra,* for the adjudication of matters left undetermined in the former appearance of the case in the Court of Appeals of Kentucky. This particular appeal was

prosecuted by Chloe A. Davis (or Hatfield) and eleven others, as joint lessors of the tract in question to the Blackberry-Kentucky Company: appellants seeking to be relieved from paying a judgment that had been awarded Kentland Coal Company against them and their lessee and sub-lessee, jointly, upon the theory that they should not be held liable in damages at the rate of twelve cents per ton (which the court in Blackberry, Kentucky v. Kentland, *supra,* found to be the value of the coal in place and the measure of damages for its inadvertent conversion) or at any other rate in excess of the seven (7) cents per ton royalty provided to be paid them under the terms of their original lease to the Blackberry-Kentucky Company. Suffice it to say that on this appeal the court upheld the judgment of twelve and one-half cents per ton as against Chloe Davis and her eleven co-lessors; and on the question generally of their joint liability with their lessee and sub-lessee the court *held*:

> *Syl. 1*: Lessors were liable on the theory that the relation of *principal and agent* was in a sense, by the terms of the lease, created; and, if their lessee or sub-lessee committed the trespass in the execution of th lease, it must be presumed that they were *acting for the lessors* in its commission, and therefore the law implied that, in the commission of the trespass, the sub-lessee, by virtue of the lease, was *authorized, encouraged,* and *procured by the lessors* to commit it."

We submit that under this Kentucky rule respondent's coal lease to Knott Coal Corporation, dated March 15, 1921, five and a half years before the trespass was inaugurated (see *Lease,* Item 32 of "Binder A" of "Original Papers"), and the letter from respondent's president, *Dudley,* to Knott Coal Corporation's president, *Hugh L.*

Buford, dated June 4, 1929, reciting "the circumstances under which it (the lease) was executed" (see Letter, page 22 supra) leave nothing to inference, but on the other hand conclusively show that the respondent knowingly included petitioner's 100-acre tract in said lease with the deliberate purpose of procuring its lessee, Knott Coal Corporation, to mine and remove the coal underlying petitioner's land for respondent's own account.

POINT VII.

The Circuit Court Has Misconceived the Use and Application Made by Petitioner of the So-called Kentucky Double Liability Statute.

This Statute (*Carroll's Kentucky Statutes,* Sect. 1244 (a)-1, which became operative on June 21, 1928) is set out *in extensio* at page 32 supra. It has never been construed by the Kentucky Court of Appeals.

The evidence shows that of the 113,680 net tons of coal agreed upon as having been mined from petitioner's land (Tr. Vol. II, p. 245), only 23,433 tons were mined after the statute became operative. The court's interpretation of the statute, and its application of the statute to the coal mined after the statute became effective, while pertinent to a determination of the merits of the case, is not deemed pertinent to our immediate contention that the Circuit Court erred in holding that "it is upon this statute that the plaintiff (petitioner) mainly relies" in the assertion of its claim for basic compensatory damages in the amount of the f. o. b. value of the entire 113,680 tons of coal which respondent procured its lessee to mine and remove from petitioner's tract of land.

Once again do we beg leave to refer the Court to our Petition for Rehearing of the cause by the Circuit Court of Appeals (Tr. Vol. III, from mid. of p. 140 to bot. of

p. 144) for a full discussion of this Double Liability Statute, and of the Circuit Court's misconception of the use and application which petitioner made of it in contending for basic compensatory damages in the amount of the f. o. b. value of said 113,680 tons of its coal, which was none at all.

POINT VIII.

The Federal Constitution Guarantees Petitioner the Right to Have its Claim for Damages Determined by the Law of Kentucky; And this Court will Make Its Own Examination of the Facts in Determining whether the Circuit Court of Appeals has Denied that Right to Petitioner.

The lower federal courts cannot avoid the obligation to enforce the rule of Kentucky law that the price at the tipple is the measure of damages for a willful trespass, by deciding, contrary to the evidence, that the trespass was innocent. This Court, in order to ensure the application of the rule of *Erie R. Co.* v. *Tompkins,* and restrain the lower federal courts from invading rights which are reserved by the Constitution to the several States, will determine for itself which branch of the Kentucky rule of damages the evidence required to be applied. If the lower federal courts were free to apply the proper rule of Kentucky law or not, merely by announcing conclusions which the evidence does not justify, the application of Erie R. Co. v. Tompkins could be avoided, and the jurisdiction of this Court eluded, by arbitrary findings of fact.

The principle to be applied is analogous to that announced in *Harris* v. *Balk,* 198 U. S. 215, and *American Express Co.* v. *Mullins,* 212 U. S. 311. In the latter case this court determined for itself whether there was anything in the record which relieved the trial court from

the duty of enforcing the full faith and credit clause of the Constitution. The same principle has been frequently expressed in numerous cases where state legislation was asserted to have impaired the obligation of contracts. *Mobile & Ohio R. R.* v. *Tennessee,* 153 U. S. 486; *Terre Haute and Indianapolis R. R. Co.* v. *Indiana,* 194 U. S. 579; *Ward* v. *Love County,* 253 U. S. 17; *Columbia Ry.* v. *South Carolina,* 261 U. S. 236.

It is manifest that where this Court is required to determine whether a lower court has enforced the proper rule of the law of the State, it is frequently necessary that this Court must make its own independent examination of the facts, in order to determine what rule of State law should have been applied by the lower court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that Court to certify and send to this Court, for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, *Number 8142, Kycoga Land Company, a corporation, Appellant,* v. *Kentucky River Coal Corporation, a corporation, Appellee,* and that the said decree of the Circuit Court of Appeals for the Sixth Circuit rendered in said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief or remedy in the premises as to this Honorable Court

may seem meet and just; and your petitioner will ever pray.

KYCOGA LAND COMPANY, *Petitioner,*
By JOSEPH S. GRAYDON,
Cincinnati, Ohio.
BUFORD C. TYNES,
Huntington, West Virginia,
Attorneys for Petitioner.

CADWALADER, WICKERSHAM & TAFT,
New York City,
MAXWELL & RAMSEY,
Cincinnati, Ohio,
Of Counsel for Petitioner.

BUFORD O. TYNES
ATTORNEY & COUNSELLOR
HUNTINGTON, W. VA.

Feb. 3, 1923.

Mr. W. S. Dudley, President,

Kentucky River Coal Corporation,

Lexington, Ky.

My dear Mr. Dudley:

I have not found it possible as yet to make the trip over on Kentucky River that I told you in December I expected to make about the middle of January. It is my plan, however, to be down your way and over in the Hazard and Whitesburg field sometime during the week of February 12th. Judging from my talk with you, I take it that the tracts that you would be at the present time interested in acquiring from us are as follows:

1st: Our Andy Singleton tract No. 1545 and our Samuel Ritchie tract No. 1546, containing 243 and 124.5 acres respectively, situate near the head of Clear Creek in Knott County and lying at the back of your Hardy-Burlinghame lease, and comingled generally with your present holdings.

2nd: Our William Kelly tract No. 1671, containing 100 acres, situate in the very head of a right hand branch of Lotts Creek in Knott County, Kentucky, and included in the territory of one of your leases.

3rd: Our John M. Bailey (D. D. Mullins) Tract No. 1533, containing 53.33 acres, situate for the most part on the right hand side of the Trace Fork of Irishman Creek in Knott County.

(The above three tracts are comingled with the developed properties of your Company).

4th: Our Elihu Brown tract No. 1507 containing 47 acres, situate on both sides of Dry Fork of the Kentucky River, in Letcher County, about two-thirds of the way up said Dry Fork.

5th: Our Samuel Holcomb tract No. 1508, containing 102 acres, and situate on top of the ridge into which Dry Fork, Smoot Creek and Sand Lick head, also in Letcher County.

(Note: The last two mentioned tracts are comingled with your Letcher Coal & Coke Company properties).

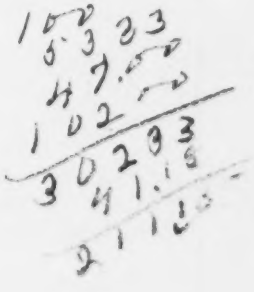
"APPENDIX A"

I have fairly complete data as to the coal on each of the above tracts; and, of course, you have and will be in a position to discuss with me the proposed consideration upon which we can get together on a sale ~~deal~~ of these tracts.

We have some other isolated tracts on the south side of Rockhouse Creek in the neighborhood of Bill Walters Branch and Little Colley Creek which we might consider either selling or trading to you for ~~the~~ tracts on the north side of the creek in the same community, either in Letcher or Knott County. I will try to advise you two or three days in advance of my proposed arrival in Lexington on my way to Hazard with the hopes that we may have a tentative conference respecting these matters before I leave Lexington for Hazard.

Yours very truly,

BCT:RCP



IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 667

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

KENTUCKY RIVER COAL CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

JOSEPH S. GRAYDON, Cincinnati, Ohio,
BUFORD C. TYNES, Huntington, W. Va.,
Attorneys for Petitioner.

Of Counsel:
CADWALADER, WICKERSHAM & TAFT,
New York City.
MAXWELL & RAMSEY,
Cincinnati, Ohio.

LESLIE WHARTON PUBLISHER, CINCINNATI, OHIO

TOPICAL INDEX

LEGAL AUTHORITIES CITED

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KENTUCKY RIVER COAL CORPORATION,
Respondent.

PETITIONER'S REPLY BRIEF

This brief will be restricted to a clarification and rectification of certain statements and arguments found in respondent's brief, arranged under topical headings descriptive of the question involved and with appropriate references to the page and paragraph where discussed in respondent's brief.

TOPIC I

RESPONDENT'S ALLEGED "UNDERSTANDING" AND "IMPRESSION" AS TO LOCATION OF PETITIONER'S 100 ACRE TRACT.

Disregarding the numerous map and deed exhibits, produced by petitioner from respondent's files and relied upon

by petitioner as showing conclusively that respondent at all times had definite and specific knowledge of the precise location of petitioner's 100 acre tract, respondent's counsel seek to overcome the consequences to respondent of such precise knowledge, (a) by showing that respondent's President, Dudley, "always had the impression" that the tract was located elsewhere than where it actually is, and as so located lay wholly *without* the exterior bounds of respondent's Knott Coal Corporation leasehold, and (b), by their argument in the alternative (indeed, in contradiction) that the letter from Tynes to Dudley of February 3, 1923 was calculated to mislead Dudley into thinking that the tract was located at an entirely different point, and as so located was situated wholly *within* the exterior bounds of said leasehold.

A. Dudley's Impressionistic Location:

Commencing at the bottom of page 2, again at slightly below the middle of page 5, and still again at the top of page 7 of their brief, respondent's counsel argue that respondent's President, Dudley, believed that petitioner's tract was located on the Trace Fork of Irishman Creek, simply because he testified that that was his "impression". Inasmuch as respondent has thus planted its claim to innocency primarily, if not exclusively, on this alleged impression of Mr. Dudley, the evidence under this heading is of vital, indeed controlling, importance. We shall show, that in order to support its contention that Dudley did not know the true location of petitioner's tract, respondent has Dudley giving to the tract a location which he could not possibly have believed to be its real location.

At the oral argument in the Circuit Court of Appeals respondent's counsel stated, as they seem now to state,

that every inconsistency in the evidence on this score is removed, and the innocent character of the trespass established, by the acceptance of the following testimony of Mr. Dudley (Tr. Vol. II, p. 69), viz:

> "I always had the *impression* and *understanding*, talking to Mr. Tynes, that that tract of land laid over on Trace Fork of Irishman's Creek, and that I could not acquire it from him."

"*Always*", even when on June 4, 1929 (*after* petitioner's attorneys Nickell and Tynes had confronted him with their discovery of the trespass during the preceeding month of May) Dudley wrote the President of Knott Coal Corporation the unequivocal and all-conclusive letter reproduced at page 22 of our petition and supporting brief! "*Always*", even (or so respondent's counsel argued) up until some unstated date after respondent had filed its original answer to petitioner's original bill of complaint and had found it expedient to alter its plan of defense! It follows, therefore, that if this testimony of Dudley—being *his* explanation of his own personal misunderstanding as to the location of the tract—can be demonstrated to be false, respondent's entire pretense of an innocent trespass is demolished.

If Mr. Dudley himself (or *any* witness for respondent) had testified, simply, that *Dudley himself* had never consciously realized (or had *forgotten*) the location of the tract as definitely shown by title deeds and maps at all times in his possession, we can conceive the possibility that such testimony might have been accepted, *for what it was worth*. But when we find that instead of relying on such proof of innocence, respondent (throughout the record and by its counsel at oral argument and now in their brief) plants its case specifically on a statement of

Dudley which is demonstrably false, we find complete justification for the Special Master's conclusion that the trespass was "wanton, wilful, or done with a reckless disregard that amounts to wilful trespass." That the statement was false—that is, that Dudley did *not* "always", *or at any time,* have the "impression and understanding, talking with Mr. Tynes, that that tract of land laid over on Trace Fork of Irishman's Creek"—is demonstrated by Tynes' letter to Dudley of February 3, 1923, which definitely and correctly states the true location of the tract as being "in the very head of a right hand branch of Lotts Creek."

Dudley did not have any such "impression" or "understanding" when (on April 20, 1929) he had his engineer, *G. Turner Howard,* make and give Tynes Original Map No. 9, which, however misleading in other respects, clearly shows the 100 acre tract in exactly the same place as described in Tynes' letter to Dudley and as shown on Dudley's Kentucky River Region Map, with the pencil letter "K" placed on the tract by Dudley on February 22, 1923. (This Map No. 9 also verifies the fact, discussed at greater length in the next succeeding sub-heading,, that "Deadening Fork" and "Road Fork" are one and the same—a fact which respondent's counsel appear to question. The map shows, also, along its right hand edge, the title "*Trace Fork of Irishman's Creek*", and demonstrates with totality that the William Kelley 100 acre tract was *not* "over on Trace Fork of Irishman's Creek"). In this connection may we say that the statement or quibble appearing on page 7 of their brief to the effect that petitioner contends that the letter "K", as placed by Dudley at several points on his Kentucky River Region

Map, stands for the petitioner, Kycoga Land Company, which admittedly had not yet come into being, is scarcely in keeping with respondent's counsel's claim to accuracy, in view of the reference made in petitioner's original brief (pages 17-18) to testimony of Mr. Tynes (See Tr. Vol. II, p. 443) that this pencil "K" stood for *"Kountze Brothers"*—the old private banking firm of 120 Broadway, New York, sometimes misspelled "Koontz"—known to Dudley as being dominant in the ownership of the "Bright" and "Richards" lands shown on his map: a circumstance found fully attested in Dudley's letter to Tynes of June 3, 1915 (Tr. Vol. III, p. 67) wherein Dudley inquired of Tynes about the prospect of his (Dudley's) company acquiring "one or two small tracts entirely within our boundaries" from *"your clients Koontz Brothers and Arthur D. Bright"*.

That Dudley could not have thought petitioner's William Kelley 100 A. Tract No. 1671 was on Trace Fork of Irishman's Creek is further borne out by paragraph "3d" of Tynes' letter to Dudley of February 3, 1923, which mentioned "our John M. Bailey Tract No. 1537, containing 53.33 acres, situate for the most part *on the right hand side* of the *Trace Fork of Irishman's Creek,"* and which is approximately 3000 feet east of petitioner's Wm. Kelley 100 acre Tract No. 1671; and so shown on Dudley's personal copy of the Kentucky River Region Map No. 17. A further significant fact is, that if the tract in controversy were in fact located "for the most part on the right hand side of Trace Fork" it would *not* be included *within* and would *not* be *adjacent*, or be *even in close proximity to* the Knott leasehold.

When Dudley's personal copy of the Kentucky River Region map was finally produced before the Master by

respondent's engineer *Howard,* on March 22, 1933, Tynes found (and later testified) that Mr. Dudley had placed the initial "K" and other notations upon the map when, on February 22, 1923, he and Dudley were discussing the possible purchase by respondent of the six tracts mentioned in Tynes' letter to Dudley of February 3, 1923. As heretofore pointed out, in his subsequent testimony before the Special Master, Tynes said that among the tracts upon which Dudley that day placed the initial "K" was "the tract that he told me he had been unable to find in advance of my arrival." Respondent's counsel would use this circumstance as supporting their argument that Dudley was "confused" as to the location of one of the tracts mentioned in Tynes' letter, and that the tract in controversy was that tract. But Dudley himself refuted any such argument and contention when, shortly after receiving Tynes' letter of February 3, 1923, in his own handwriting, in paragraph numbered "4th" of Tynes' letter, he interlined the phrase "Question where he owns": thus testifying for all time that the one and only tract of the six tracts mentioned in the letter, as to whose location he entertained any doubt, was *petitioner's Elihu Brown Tract No. 1507,* containing 47 acres and situate on both sides of Dry Fork of the Kentucky River, in *Letcher* County, about two-thirds of the way up said *Dry Fork* (shaded in green on Map No. 17, at J-20), and *not* petitioner's *100 acre William Kelley Tract No. 1671,* which is situate over ten miles away, in the very head of a right hand branch of *Lotts Creek,* in *Knott* County, Kentucky. The circumstance of Dudley's having grouped together and noted on page 2 of Tynes' letter four of the tracts, containing in the aggregate 302.33 acres, which he proposed to buy from Tynes' client, provided Tynes would take a

91.18 acre tract of his own company in exchange, and that the 100 acre Lotts Creek Tract, the 53.33 acre Trace Fork tract, and the 47 acre Dry Fork tract whose location Dudley had previously been uncertain about, were included in such group, demonstrates that when making this notation on the letter at his conference with Tynes on February 22, 1923 (which was shortly after his long-withheld formal lease to Knott Coal Corporation had been recorded) Dudley definitely understood the location *and appreciated the value to his company* of *each* of said four tracts.

B. Respondent's Argumentative Alternative and Different Location:

Commencing with the bottom of page 2 of their brief respondent's counsel present the novel argument that Tynes' letter to Dudley of February 3, 1923, was calculated to mislead Dudley into thinking that the tract in controversy, as described in paragraph numbered "2nd" of the letter, was situate elsewhere than where it really is, when Tynes described it as being "situated on the very head of a righthand fork of Lotts Creek".

Upon reference to Dudley's Kentucky River Region Map (Original Map No. 17), the Court will find that this William Kelley 100 A. mineral tract No. 1671 is located about three inches to the north of the very center of the map, at a point one inch east of where horizontal index line "N" intersects with vertical index line "15" of the map. The two tracts referred to in paragraph "1st" of Tynes' letter to Dudley of February 3d as plaintiff's Andy Singleton Tract No. 1545 and Samuel Richie Tract No. 1546, will be found shaded in green on the map at a point immediately northeast of the intersection of horizontal line "O" with vertical line "14". The tract re-

ferred to in the "3d" paragraph of Tynes' letter as plaintiff's John M. Bailey 53.33 acre tract No. 1533 will be found shaded in green on the map at a point immediately northwest of the intersection of horizontal "E" with vertical line "16". On each of said four tracts, numbered 1671, 1545, 1546 and 1533, the Court will note a lead pencil "K" superimposed over the green tinting of the respective tracts. According to the testimony of respondent's Vice-President and Chief Engineer *Howard,* these lead pencil K's were on the map when he first produced it before the Master in the winter of 1932-33. Upon close scrutiny the Court will observe a lead pencil circle or loop around these tracts, or most of them. Counsel here speak from memory. While these loops and letters "K" are now scarcely discernible, the Court will note from Howard's testimony that they were plain enough when he produced and testified about the map before the Master (R. Vol. II, p. 311). As heretofore pointed out these "K's" stand for "Kountze", and were placed on the map by Mr. Dudley, (in Dudley's office, on February 22, 1923) when he and Mr. Tynes were checking and verifying the various tracts embraced in Tynes' letter to Dudley of February 3, 1923, by this very map. Upon referring to "Appellant's Composite Oral Argument Map" the Court will note that the tract shaded in green is the form in which the Slemp letter (See our original brief, pages 2 (bot.) and 24) and enclosed map (Original Map No. 1) to Hager of December 21, 1906 proposed that the Kelley-Bright tract take, which is the identic form in which it appears on the Kentucky River Region Map; and that the tract in controversy did not asume the form in which laid down on the oral argument map in fringed red outline until after the Kelleys had made the confirm-

atory deed to plaintiff's grantors, Webb & Hoppin, of June 5, 1911. (Tr. Vol. III, p. 22).

At R. Vol. II, page 445, *Tynes,* in referring to his conference with Dudley on February 22, 1923, and to his letter to Dudley of February 3, 1923, testified:

> "He told me that he had been able to locate all of the tracts mentioned in my letter except one little tract—just what, I don't recall; but he had some notations on the letter. My recollection is that it was probably the smallest tract in the bunch. He got out the Kentucky River Region Map (Original Maps, No. 17), a copy of which I had with me also, being the map that was exhibited to the Court by the witness, G. Turner Howard, at the last hearing before the Master at Lexington, after two or three efforts to get this map produced. We then went seriatim through the tracts enumerated in my letter. Mr. Dudley marked them on his map, and on each tract the initial of our company as indicating the tracts referred to in my letter. Among other tracts that he made our initial on was the tract in controversy in this case, and on all of the tracts mentioned in the letter, including the tract that he told me he had been unable to find in advance of my arrival."

Defendant's counsel argued at the hearing that the description of the tract in question, as given in the second paragraph of this letter to Dudley of February 3, 1923, misled Mr. Dudley. With Dudley's Kentucky River Region Map (No. 17) before it the Court can see for itself that Tynes' description of the William Kelley Tract No. 1671 as being "situated in the very head of a right hand branch of Lotts Creek" is letter-perfect. The Court will observe that commencing two inches west of the tract is the title "Lotts Creek", and that the small branch upon which the tract is actually located is in fact "a right hand branch of Lotts Creek", *as shown on this*

map—the map Tynes and Dudley had before them; and that the tract is literally "*in the very head* of said right hand branch.

The locality contended for by respondent's counsel as answering Tynes' above quoted descriptive location of the tract and as being "one mile away" (to the northeast), is *not* "the very head of a right hand branch of Lotts Creek" as shown on *this* map, which is the map from which the description of the tract contained in his letter to Dudley was taken by Tynes, or (as pointed out in the parenthetical text near bot. p. 4 supra) as shown on the respondent's engineer Turner Howard's map (Original Map No. 9). The error of respondent's counsel may arise from the fact that other maps of record in this cause, notably defendant's Fox, Peck & Pursifull map (Original Map No. 11), instead of designating the main right hand fork as "Lotts Creek", as does the Kentucky River Region Map, designates it as the "Kelley Fork of Lotts Creek". From that false premise, seemingly, they argue that Tynes' letter-location of the tract places it on the head of *their* so-called right hand or Kelley Fork (or "branch") of Lotts Creek. But, as previously stated, Tynes' letter-description of the tract is in exact accord with the nomenclature used on the Kentucky River Region map, which is the one and only map he and Dudley had before them when considering Tynes' letter to Dudley; *and Dudley could not possibly have been misled thereby.* Tynes' letter plainly describes the tract as "our Wm. Kelley Tract No. 1671" which definitely locates it on Dudley's map as being exactly where it is, and where the map shows it to be, and *not* "about a mile away" (to the northeast). *That* locality is shown by the Kentucky River Region map to be entirely en-

compassed by respondent's own tract No. 1171, tinted brown and hatched with black diagonal lines, situate two inches to the northeast of petitioner's William Kelley Tract No. 1671 and listed on the legend of the Kentucky River Region Map as "Slemp Coal Company's Fernando C. Roark Fee Tract". Even if Dudley believed the tract in controversy to be so located, it would still be *within* (or partially so) the exterior bounds of his lease to Knott Coal Corporation, as is clearly demonstrated by reference to the corresponding locality on the extreme eastern end of the full length blueprint of the Fox, Peck & Pursifull map (Original Map No. 11) upon which defendant's witness Howard, at the request of the Special Master, marked out the exterior bounds of the Knott leasehold in green crayon. In this connection the Court's attention is directed to the significant fact that Dudley testified (Tr. Vol. II, p. 66) that in negotiating the lease to Knott he determined the exterior bounds of the Knott leasehold from this Fox, Peck & Pursifull map.

TOPIC II
RESPONDENT'S WOULD-BE PLEA (AND PROOF?) OF ESTOPPEL.

Commencing at the bottom of page 3, and again in "Point 3", page 12 of their brief, respondent's counsel undertake to meet the argument, presented in "Point III", page 42 of petitioner's brief, that respondent failed either to allege or prove acts and conduct upon the part of petitioner which, under the controlling Kentucky law, would absolve respondent from the larger measure of damages.

While by its amended answer of January 8, 1934, filed five months after the Master had returned his report, and which is the basis of petitioner's Assignment of

Error numbered "(3)" (Tr. Vol. I, p. 207), respondent pleaded the circumstance of petitioner having (on April 25, 1930, a year after the trespass had been committed) made a lease (Original Papers Nos. 59 and 60) of its remaining unmined coal to respondent's lessee, Knott Coal Corporation, as commiting petitioner to some sort of an "adoption" of respondent's lease to Knott Coal Corporation, thus in some manner estopping petitioner from claiming the larger measure of damages, the fact remains that in *none* of its pleadings did respondent *plead* or in any manner rely upon, or *prove* or *assume* to prove, any conduct upon the part of petitioner, either contemporaneous with or anteceding the commission of the trespass, as constituting an estoppel against petitioner's right to recover the larger measure of damages.

TOPIC III
RESPONDENT'S CLAIM THAT TRESPASS WAS INNOCENT BY REASON OF AN ALLEGED "CONFUSION OF TITLE."

At pages 14 and 15 of their brief respondent's counsel state that the title issue was "difficult of decision", basing their statement, seemingly, on the characteristic exhaustiveness and length of Judge Cochran's opinion on that issue. We submit that this Court will find that Judge Cochran had not the slightest difficulty in finding that respondent did not own the tract in controversy, and had no color of title thereto, and that the petitioner did and does own it. There is nothing in the opinion to sustain, but on the contrary the findings and conclusions of Judge Cochran wholly refute, respondent's counsel's statement that Judge Cochran found that Kentucky River Coal Corporation had no knowledge, or was not chargeable with knowledge, of the transactions (from 1905-1911)

between the Slemp and Bright interests which culminated in the recognition and ratification by the Slemp Companies of Bright's ownership of the tract in controversy. Respondent's attitude throughout the record on this title issue, including its indecision and conduct generally with respect to the prosecution of an appeal from Judge Cochran's opinion, will be found to be eloquent of the fact that respondent at no time entertained any hope that it could show either title or color of title to petitioner's tract, just as Judge Cochran found it had not done; and that respondent injected the principle of "confusion of title" in the case as a smoke screen to obscure acts and conduct otherwise plainly discernible as "wilful and wanton".

The facts of the two cases cited on pages 14 and 15 of respondent's brief are in no wise analogous to the facts of the case at bar. The *Middle Creek* case involved the driving by the defendant of its coal-mining entries into a one-acre tract of land which the plaintiff claimed to own by reason of a reservation contained in a deed conveying a 274 acre tract of land which reads—

> "One acre reserved on the grave yard point, beginning at a small black pine standing on the Southwest end of the point about thirty-five steps from the grave of James P. Harris, Sr., thence running",

by various and sundry similar designated calls, to the beginning. The court found that not only had the mining company caused the one-acre reservation to be surveyed and mapped by a competent engineer (although incorrectly so, as the court determined), but that when interpreted by the case law of Kentucky the mining company was justified in construing the reservation as being not of the coal underlying, but merely of the cemetery rights

with respect to, the surface of the reservation. In other words, that case involved both a "confusion" as to the correct location of the boundary line of the reservation and as to the language of the reservation itself.

The *Blackberry-Kentucky* case cited by respondent was the second appearance of the case in the Court of Appeals of Kentucky. Upon reference to the decision of the court in the former appearance (212 Ky. 64, 278 S. W. 173), the Court will note that the Kentucky court found that neither the plaintiff nor defendant had good title of record to the 80 acre parcel of land trespassed upon by defendant (defendant's title to the tract having been sustained by adverse possession); that said 80 acre parcel was made up of two gores of land which had their existence in the correct interpretation and location of the lines of six different patents which, taken together, were found to cover the tract; that defendant had exercised the utmost good faith in locating the lines of these conflicting patents—correctly so, as defendant believed—and that as a consequence of its good faith efforts in the premises, defendant's acts of trespass upon the tract were excusable, or, in the language of the court, upon the second appearance of the case as cited by respondent, immediately preceeding the excerpt from the court's opinion found reproduced on page 14 of respondent's brief—

> "The record discloses that Chloe A. Hatfield and others (lessors) were in utmost good faith in their belief that they were owners of the 80 acres of land in dispute, and their lessees were likewise in utmost good faith in their belief that this disputed land had been leased to them and that they had the right under their lease to take the coal from it."

There are no elements in the case at bar which admit of the application of the principal of "confusion of title" by which the two cases just mentioned were controlled. The trespass in the case at bar was in no sense attributable to uncertainty as to the interpretation of a deed or as to the location of the tract of land described in it, or of any other tract or tracts of land, for that matter. The record discloses not the slightest issue with respect to any part of the common boundary line between petitioner's 100 acre tract and lands of the respondent which adjoined petitioner's tract throughout almost its entire periphery. The tract was either wholly petitioner's or wholly respondent's. Judge Cochran encountered no difficulty in finding that the entire tract belonged to petitioner. The only issue before this Court is, in view of Judge Cochran's opinion and the ensuing record of the case, whether the respondent had knowledge, *or was chargeable with knowledge,* that *petitioner* owned, or that *it itself* did *not own,* the tract. Nothing more, nothing less.

TOPIC IV
A FURTHER OBSERVATION UNDER POINT VI, PAGE 53, OF PETITIONER'S ORIGINAL BRIEF.

At page 17 of respondent's brief appears this vitally important and erroneous statement:

> "We find no case where a *landlord* has been held liable except as an innocent trespasser".

In our original brief we cited the case of *Thompson, et. al.* v. *Dentzell, et. al.,* 232 Ky. 755, 24 S. W. (2d) 607, as being just such a case. In view of the importance of the case, which remains the law of Kentucky on the point, and of the fact (as evidenced by this statement of counsel) that the full significance of the court's opinion

may be grasped only by reading the court's opinion in a former appearance of the case in the Court of Appeals of Kentucky (*Jim Thompson Coal Co.* v. *Dentzell,* 216, Ky. 160, 287 S. W. 548), we have presumed to work out and give the Court this brief resume of the facts and holdings in both cases.

Sometime prior to 1922 Mrs. Sallie Thompson, wife of Jim Thompson, who was owner of a coal lease upon the coal land of another, made a sub-lease of the property to her husband, who operated the lease as Jim Thompson Coal Company. In 1922 and 1923 the coal company, in prosecuting its coal mining operation on its own leasehold, extended its entries into the lands of one Dentzell, and mined and removed therefrom over 3,000 tons of Dentzell's No. 9 seam of coal. In a suit (the former of the two) brought to determine the damages accruing to Dentzell, the Court held that inasmuch as Mrs. Thompson's sub-lease to her husband's company did not include the Dentzell tract she was in no wise liable for the company's trespass, which, under the circumstances obtaining, the court found to have been a wilful one, for which the Jim Thompson Coal Company was required to respond in damages on the basis of the market value of the coal it had mined from the Dentzell tract—or approximately $2.00 per ton. The Jim Thompson Coal Company went out of business after this judgment was entered against it, as had the two or three companies before it which had unsuccessfully conducted mining operations on the property under a sub-lease from Mrs. Thompson. The Drakesboro Coal Company was Mrs. Thompson's next sub-lessee of the property, but it too soon passed out of the picture, when Mrs. Thompson's husband again took a sub-lease from his wife in the name of Puritan Coal

Company, of which he was president and general manager. In September, 1925 the lease was turned over to the Rogers Coal Company, whether by sub-lease from Puritan Coal Company or from Mrs. Thompson is not clear. Rogers Coal Company operated the property from October, 1925 until after June, 1926. In June, 1926, Dentzell, having discovered that the operations under the Thompson lease had again been extended into his coal, brought the second of the two suits against Rogers Coal Company, Sallie Thompson and J. M. Thompson, jointly, and was awarded a judgment against the Rogers Coal Company in the sum of $5,520. for the 4,600 tons of coal extracted by it from Dentzell's land between September, 1925 and June, 1926; against J. M. Thompson in the sum of $10,792.60, for 8,993 tons extracted by him and the Puritan Coal Company from Dentzell's land during the time they were operating the lease, and against Sallie J. Thompson for both amounts. Upon appeal from that judgment, the Kentucky Court of Appeals found that while Mrs. Thompson had been exonerated from all liability upon the facts obtaining in the former of the two cases, she could not escape under the facts found in the latter, and accordingly affirmed the judgment rendered aganst her in the lower court *for the full market value after being mined* of *all coal mined* from Dentzell's land by *both* the *Puritan Coal Company* and *Rogers Coal Company.*

This is the only case on this precise point that our research has disclosed. We submit, with all earnestness, that the case is the law of the case at bar, albeit it may stand alone.

TOPIC V
MISCELLANEOUS CLARIFICATIONS OF FACT.

By way of curing, if such be needed, petitioner's failure to refer to the record for support of certain statements made in the first paragraph of petitioner's narrative of "The Salient Facts", on page 14 of the petition, adverted to in the first literary paragraph of main paragraph numbered "IV" of respondent's brief, suffice it to say:

1. The Bufords' Engineer, *D. T. Mitchell,* later General Manager of their subsequently formed company, Knott Coal Corporation, testified (Tr. Vol. II, pp. 372-3) as follows:

> "I ran the outcrop of the No. 9 seam of coal about 1919, *or in 1918,* all around . . . in that country generally . . ., not only on that lease but on adjacent property. I was sent there by Mr. Buford to find out what body of coal we could get together in one contiguous body of this No. 9 seam that could be mined from a point on the other creek. I ran, oh, several hundred acres over and above what we had on this lease . . . In fact the Wisconsin lease was included in that survey, and a lot of Mr. Hardaway's land down to the mouth of Irishman; and the map then was entitled 'Map of No. 8 (what we called it then) Outcrop on Carr's Fork & Lott's Creek' . . . The work that we did in getting together the information the Bufords wanted for the purpose of determining whether or not they would be interested in making this lease, was paid for by Mr. W. S. Dudley, President of the Kentucky River Coal Corporation."

2. Knott's President, *Mr. Hugh Buford,* testified that he participated in the negotiations that led up to the taking of the lease from respondent to his company (Tr. Vol. II, p. 109); *that they took the lease entirely on the No. 9 seam;* that from the openings they made in the

No. 9 seam *"the coal was demonstrated as of exceptional height* (thickness) *for our entire field"*; that at the time of these negotiations he was Manager of Ashless Coal Corporation, of which his father (Mr. L. N. Buford) was president (*Idem* p. 110, commencing near top); that the prospecting of the leasehold was done under his general supervision. "All the work done by us in the way of surveying was done by Mr. Mitchell, for the purpose, and the only real purpose, of determining the approximate acreage of the No. 9 seam in that territory that the Kentucky River Coal Corporation proposed to lease to us." (*Idem* p. 111).

3. The statement appearing on p. 14 of our original brief, namely, that as at the time when the above mentioned negotiations between the Bufords and Mr. Dudley were first inaugurated (*not* when, later on, the lease in consequence of such negotiations was consummated, as counsel, at page 6 of respondent's brief, "times" said statement), respondent owned less than two-thirds of the acreage (of the No. 9 seam which the Bufords had under surveilance as being desirable and essential to economic development) is an under rather than over-statement. As heretofore pointed out, respondent did not own the *Franklin,* the *Litz,* the *Watts* or *Hardaway* tracts, and, of course, the 100 acre tract in controversy. Respondent's (and before it Mr. Slemp's) land agent of twenty-five years standing, *E. C. Holliday,* testified that in the spring of 1919 respondent did not own, but in his judgment should acquire, the *Katherine J. French* tract (See Original Map No. 11), which contained 375 acres, nor *"two tracts on Sassafras Creek"*; and that he told respondent's Chief Engineer Howard so (Tr. Vol. III, p. 429). The Katherine J. French tract and one of the two Sasafras

Tracts (namely, the so-called *H. H. Smith* Tract of 202.46 acres, which was owned at that time by the Hardaway interests (See Original Map No. 11) were later acquired and included in respondent's original letter-lease to Knott of August 2, 1919. Reference to Dudley's Kentucky River Region Map (Original Map No. 17), shown to have been revised as at 1911, serves to demonstrate the embryonic state of respondent's ownership in that territory as of that date, while the testimony of witnesses above adverted to shows that of the approximately 2500 acres which were included in the ultimate lease of respondent to the Bufords (and in respondent's undertaking to acquire and add certain tracts to that lease), respondent, at the beginning of its negotiation with the Bufords, *owned less than 40%.*

4. As regards the statement appearing near the bottom of page 4 of respondent's brief: The record neither shows nor intimates that "terms had been reached" between petitioner and Knott Coal Corporation as a condition precedent to (or post) its dismissal of the the cause as to that Company on August 7, 1933, (which was after the Master had prepared but had neither filed nor divulged his findings) as counsel for respondent well know and as the voluminous record of the events leading up to the execution by petitioner to Knott Coal Corporation (on April 25, 1930) of a lease on the coal remaining unmined in its 100 acre tract after the termination of the trespass attests. (For lease See Original Papers, No. 59; and for an ancillary agreement of the same date see Original Papers, No. 60). For three long years after the execution of these two instruments petitioner prosecuted this suit against respondent and Knott Coal Corporation jointly, and took a non-suit as to Knott only because its counsel

had become convinced that the trespass was an innocent one so far as Knott was concerned, and for the further reason that its counsel had come to the conclusion that under the Kentucky law petitioner could not sustain a decree in equity which fixed a different measure of damages against two joint trespassers for one and the same act of trespass.

TOPIC VI

THE ERROR OF BOTH THE DISTRICT AND CIRCUIT COURTS DERIVES FROM THEIR FAILURE TO ABIDE ESTABLISHED KENTUCKY CASE LAW, RATHER THAN FROM THEIR REJECTION OF THE MASTER'S FINDINGS OF FACT.

We adhere to the thesis advanced in "Point V", page 47, of our original brief, viz: That the so-called two-court rule finds support in reason only when the District Judge, through having heard and observed the witnesses testify, has had the same opportunity of judging of their credibility as did the Special Master.

Respondent's counsel appear to lean heavily (pp. 16 and 17 of their brief) upon this excerpt from Circuit Judge *Simons'* opinion:

> "The master's findings of fact are here based wholly upon inference, the reasonableness of which may be as fairly determined by the court as by him."

The pertinent text of the Master's report is found reproduced at pp. 7 and 8 of our original brief, wherein the Master is shown to have *found* (or reached the conclusion, based on inference, as Judge *Simons* chooses to regard it) that the trespass was "wilful": *Wilful* under the case law of Kentucky ruled upon like facts and situations.

The Kentucky cases found cited in our original brief

illustrate beyond per adventure, we submit, that knowledge, or *means of knowledge* that the trespasser may not be permitted to pass up unheeded, are of like potency and effect in determining the quality of the trespass; and that only where acts and conduct of the true owner, specifically alleged and positively proven, are demonstrated to have actively induced the acts constituting the trespass, may the trespass be deemed otherwise than wilful.

Near the bottom of page 10 of our original brief we made passing reference to this highly important statement found in the opinion of District Judge *Ford*:

> "Although it is not shown by the evidence that Mr. Dudley was *fully* aware of the *definite* or *exact* location of the boundary lines" of petitioner's tract, "it can *scarcely be doubted* that *at all times he knew* this land was *located somewhere within* the vast territory embraced in the lease. The correspondence which passed between Mr. Dudley and Mr. Tynes, together with testimony of Mr. Tynes relative to their negotiations for the sale to defendant of various tracts owned by the plaintiff, *including the tract in question, clearly demonstrates* that *both* parties *well understood* that the lease to the Knott Coal Corporation *embraced the land in question*". (Tr. Vol. I, center p. 177) (Italics supplied).

At Point "(5)", p. 28, of our original brief we referred to statements of similar import appearing in the opinion of Circuit Judge *Simons,* which read (Italics supplied):

> "It may well be that the appellee (respondent) *did not exercise due care to ascertain the limits of its property* beyond which it should not have permitted the operations of its lessee to go." (Tr. Vol. III, near bot. p. 130).

"Whether Dudley . . . knew *precisely where* the plaintiff's 100 acres were located is not clear . . . He *testified* he did not know. That it was *somewhere within the outer boundary* of the leased premises he probably *did know.*" (Idem, bot. p. 131).

"As found by the District Judge, the correspondence between Dudley and Tynes relative to negotiations for the sale of various tracts owned by plaintiff, *including the tract in question,* demonstrates that *both* parties understood that the lease to Knott *embraced the land here involved.*" (Idem, bot. p. 132).

"Guilty of negligence Dudley may have been in speculating upon his ability to purchase the property from the plaintiff; guilty of negligence he may have been in failing to follow Knott operations in the region of the plaintiff's land closely enough so as to prevent Knott's entry thereon before he had *concluded* the *purchase* of *the property.*" (Idem, near top p. 133).

Thus is it demonstrated, that the finding of Special Master *Menzies,* District Judge *Ford* and Circuit Judge *Simons* were uniform in respect of this one controlling fact: Knowledge, *actual knowledge,* upon the part of the corporate respondent—through its deeds, its maps and other title papers and corporate records, and through its President, *Dudley,* its Vice-President and Chief Engineer, *Howard,* and its land agent, *Holliday* (and its Engineer William *Pursifull,* who testified at Tr. Vol. II, p. 103, that as far back as 1916, when doing some surveying in the territory for respondent, he told respondent's President and its abstractor and agent J. B. Hoge, that respondent did not own the tract in controversy)—that petitioner's 100 acre tract was included in respondent's lease to Knott Coal Corporation. From all of which it follows, as is somewhat more fully brought out in our Petition for Rehearing of the cause by the Circuit Court of Appeals

(Tr. Vol. III, pp. 138-40), that the principal error in the premises derives *not* from the fact that "the Master's findings are based wholly upon inference", as stated by Circuit Judge *Simons* (Tr. Vol. III, p. 130, just above center), or are but the "mere dogmatic conclusion on the part of the Special Master", as stated by respondent's counsel (bot. p. 9 of their brief); and *not* from the fact that the District and Circuit Courts found this all-controlling fact *contra* the finding of the Special Master: *but from the fact that both those courts failed utterly to impose upon their own and the master's like finding the inescapable legal consequences imposed upon such facts and situation by the decided cases of the Court of Appeals of Kentucky.*

Compare, apropos respondent's invocation of the two-court rule, the recent case of *United States* v. *Appalachian Electric Power Co.,* 85 L. Ed., 201, 206, where this Court, speaking through Mr. Justice *Reed,* said:

> "There is no real disagreement between the parties here concerning these physical and historical evidentiary facts" (in that case facts showing "navigability", in the case at bar the "quality of the trespass"). "But there are sharp divergencies of view as to their reliability as indicia of navigability and the weight which should be attributed to them. The disagreement is over the *ultimate* conclusion upon navigability to be drawn from the uncontroverted evidence.
>
> "The respondent relies upon . . . the conventional rule that factual findings concurred in by two courts will be accepted by this Court unless clear error is shown * * * When we deal with issues such as these before us, facts and their constitutional" (in the case at bar, Kentucky case law) "significance are too closely connected to make the two-court rule a serviceable guide . . . Both the *standards* and the *ultimate*

conclusions involve questions of *law inseparable from the particular facts to which they are applied.*"

Respectfully submitted,

JOSEPH S. GRAYDON,
Cincinnati, Ohio.
BUFORD C. TYNES,
Huntington, West Va.,
Attorneys for Petitioner.

CADWALADER, WICKERSHAM & TAFT,
New York City,
MAXWELL & RAMSEY,
Cincinnati, Ohio,
Of Counsel for Petitioner.

Cincinnati, Ohio,
January 29th, 1941.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

No. 677

KYCOGA LAND COMPANY, a Corporation,
Petitioner,

vs.

KENTUCKY RIVER COAL CORPORATION, a Corporation,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETER T. WHEELER,
Hazard, Kentucky,
SIMEON S. WILLIS,
Ashland, Kentucky,
Attorneys for Respondent.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

SUBJECT INDEX.

VIII.

Alphabetical Table of Texts and Cases Cited.

IN THE

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BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Kentucky River Coal Corporation, in opposition to the petition herein filed by the Kycoga Land Company, for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit, respectfully represents:

I.

This was an action to recover a tract of 100 acres of coal land in Knott County, Kentucky, and to recover damages for mining by respondent's lessee of about seven and one-half acres of coal from the tract. The respondent owned the land surrounding the tract in question and believed it had a good title to the particular parcel. The question of title was tried first and resulted in favor of petitioner. The question of damages was referred to a Special Master, whose report was to have no presumptive effect, reserving for determination by the Court as if no findings had been made all questions embraced in the reference (Record pp. 71-72). The Special Master made a report, to which both parties excepted. The District Court found the trespass to be an innocent one and awarded compensatory damages in accordance with the rule in Kentucky. The Circuit Court of Appeals affirmed the judgment.

II.

The "Explanation for the guidance of the Court" (Petition pp. 1-4) is in the nature of argument, omitting the opposing documents and evidence and ascribing to the maps and documents listed on pages 2, 3 and 4, and numbered (a), (b), (c), (d), (e), (f), (g), (h), (i), (j) and (k), probative effects not justified by them. None of the maps or documents so listed show or tend to show that respondent had knowledge of plaintiff's ownership of the land in controversy or knowingly or deliberately or at all procured, permitted or caused its lessee to mine any coal therefrom. On the contrary, Mr. W. S. Dudley, who was president of respondent, believed that the land claimed by petitioner lay on the Trace Fork of Irishman Creek (Record, Vol. 11, page 69), remote from the mining operations of the lessee. The letter of Mr. Buford C. Tynes, dated February 3, 1923, photostat copy of which is attached to

the back of the Petition as Exhibit A, referred to the William Kelly tract, which is the tract in controversy, as "situated in the very head of a right-hand fork of Lotts Creek," and did not constitute notice of its actual location, or such a reference as was calculated to correct the impression of Mr. Dudley as to its being on the Trace Fork of Irishman Creek. The land in fact was located on "Road Fork," or "Deadening Fork," as it was sometimes called, which was a branch of the right fork, known as Kelly Fork of Lotts Creek. The "very head" of that fork was more than a mile from the place where the coal was mined. This mistake of Dudley as to where the land was located must be borne in mind in considering his words in respect to the land claimed by petitioner, and all his acts in the matter.

The proof for respondent showed that the mining of the coal was the result of innocent mistakes not uncommon or unlikely in the circumstances. The land was located in a wild section of country at least two miles from the Knott tipple, at a time when it was believed that all land claimed by petitioner was a mile farther away from the actual operations. Both the trial court and the Circuit Court of Appeals found from the evidence that the trespass was an innocent or inadvertent one, which was in accordance with the great weight of the evidence.

III.

PROCEEDINGS IN THE DISTRICT COURT.

The recital of the proceedings had in the District Court (Petition pages 4-14) is so tinctured with partiality that certain additional facts must be supplied in order that a correct picture may be presented to the Court.

(1) The reference to the pleadings omits mention of the amended answers filed from time to time in which all the

defenses were presented. The original answer was filed January 23, 1931 (Record, p. 23). An answer to the third amended bill was filed on June 12, 1933 (Record, p. 97), and the petitioner's reply was traversed of record (pages 139-140). Then an amended answer was filed on January 8, 1934 (Record, p. 153). These pleadings relied on denials, champerty, waiver, ratification, confirmation, adoption, release and estoppel, and on good faith and innocence in the matter of the trespass by the lessee of respondent. No question of the sufficiency of the pleadings was raised in the lower courts.

(2) Judge Cochran decided, after much labor and considerable difficulty (Record, Opinion, Vol. 1, pp. 49-69), that the petitioner had the better title, and he ordered a reference to a Special Master "to ascertain what damages occurred to plaintiff's property by reason of the trespasses set out and alleged in its petition subsequent to May 1, 1927," and also "to find what damage occurred prior to May 1, 1927," reserving for further consideration the right of recovery in respect to such alleged damage. He provided by his order to the Special Master that "the findings which he may make shall not be final or given any presumptive effect, but the question as to all such matters shall be open for determination by the Court as if no findings had been made" (Record, pages 71-72).

The Special Master reported on August 11, 1933 (Record, pp. 118-122), filing the evidence with his report. Four days before the printed report of the Special Master was filed, the petitioner presented a motion to dismiss the action as to respondent's lessee, the Knott Coal Corporation (Record, p. 113), which motion was granted on August 23, 1933 (Record, pp. 123-124). No doubt terms had been reached with it. The Special Master's report was not based on a finding of facts from a consideration of con-

flicting testimony, but consisted of some dogmatic deductions from circumstances wholly insufficient to justify the conclusions he stated. The first circumstance relied upon by the Special Master was that three tracts of land, known as the Watts, Franklin and Litz tracts, had been included in the lease to the Knott Coal Corporation on a mere expectancy that they could be acquired and would be acquired. This was not true, as matter of fact (Record, Vol. III, p. 61; Testimony of G. Turner Howard, Vol. II, page 58). The tracts referred to were adjacent lands, not embraced in the lease at that time, but desirable to be acquired later. From this circumstance, the Special Master inferred or imagined that the respondent had knowingly embraced the land claimed by petitioner in the lease in the hope that it could be acquired. The only other circumstance mentioned by the Special Master was a portion of a letter written by Mr. Dudley, after the controversy arose, in which he stated that while the tract in controversy was included in the outside boundary of the lease, the company never claimed title to this tract, but expected or hoped to get it, in which event it would be added to the lease. As a matter of fact, Mr. Dudley knew the Kycoga Land Company claimed some land in that section, but he believed it was located on another creek, known as Trace Fork of Irishman's Creek (Record, Vol. II, p. 69).

The Master's report was contrary to the facts and recommended a rule of damage in disregard of the law of Kentucky in trespass cases.

Both parties recognized this and filed exceptions. The opinion of the Circuit Court of Appeals accurately notes:

> "Both parties agree that the Master's recommendation in this respect is untenable. The Court did not adopt it or consider it of sufficient merit to warrant discussion" (Opinion, Record, Vol. III, p. 127).

The District Judge wrote a careful opinion, finding the trespass to be an innocent or inadvertent one, and applied the rule of reasonable royalty, which is the settled law of Kentucky in such cases (Opinion, Record, Vol. I, p. 174).

The Circuit Court of Appeals affirmed the judgment (110 Fed. [2d] 894; Record, Vol. III, p. 126). The opinion exhaustively deals with every point suggested by the petitioner in that court, and sustained the finding of the trial court that the trespass was inadvertent and innocent.

IV.

The petition sets out what is called "the salient facts (mostly documentary) upon which the petitioner relied to show the trespass was willfully, knowingly and intentionally committed" (Petition, pp. 14-26). But they fail to cite the record for many of the statements made, and we are unable to find in the record any support for the statement in the opening paragraphs regarding a particular seam of coal, and the negotiations preceding the so-called letter lease of August 2, 1919.

It is not true that the Kentucky River Coal Corporation owned less than two-thirds of the acreage it leased to the Knott Coal Corporation. In fact, it owned, or believed in good faith that it owned, all of the land it leased to Knott. The letter containing a description of the outside boundaries of the lease referred to some adjacent tracts which it did not own, but which it would endeavor to acquire. These outside lands were known as the Watts, Franklin and Litz tracts (Record, Vol. III, p. 61; Testimony G. Turner Howard, Vol. II, p. 58). It will be noted from the description of the tract of land in the letter lease that it stopped at a point "at the Trace Fork of Irishman Creek side opposite the head of Kelly Fork of Lotts Creek."

Mr. Dudley at all times was under the impression that all

the land within that boundary belonged to the Kentucky River Coal Corporation. It was so shown on his map, and while he was aware of the fact that certain lands were owned by Bright or Webb & Hoppin (now Kycoga Land Company's land), he thought it was located on the Trace Fork of Irishman's Creek, and completely outside the boundary of the Knott lease. The lease letter to L. N. and Hugh Buford was dated August 2, 1919, and it was to be followed by a formal lease, when the boundary could be surveyed and accurately described, and the full terms of the lease determined. This was subsequently done; formal lease was given on March 15, 1921, and recorded on July 20, 1922. The Kycoga Land Company was not then in existence, and did not come into the picture until May 1, 1927, when Webb and Hoppin, who had acquired the Bright tracts, conveyed to the Kycoga Land Company. This was the reason for Judge Cochran separating the damages into two periods. One was the period prior to the formation of the Kycoga Land Company, and the other was the time subsequently thereto. This was the explanation of why Webb and Hoppin became parties to the litigation. This fact illustrates the absurdity of the claim by petitioner (Petition, p. 18) that on February 23, 1923, Mr. Dudley put initial letters on certain tracts of land. An inspection of the map will show that the penciled letter appearing on several tracts is "K." The contention that this referred to "Kycoga" overlooks the fact that Kycoga did not come into the title until May 1, 1927, several years after this supposed conference. The lands then were claimed by Webb and Hoppin. It is upon such flimsy testimony that petitioner sought to bring notice of its claims to Mr. Dudley, who was dead when that testimony was given. Mr. Tynes referred to him as the "late Mr. Dudley" (Record, Vol. III, p. 443).

The question was raised whether the Kycoga Land Com-

pany could recover in any event for trespass committed on the land prior to the time it acquired title from Webb and Hoppin.

The negotiation of Mr. Dudley for the purchase of land from Mr. Tynes, who represented the Bright interests, was not confined to the single tract now in controversy. It was among the least of them. The negotiations covered numerous tracts and contemplated the purchase of inside tracts, or the exchange for other tracts so as to give each party compact and solidified boundaries. It concerned 1,800 to 2,000 acres, made up of small tracts (Record, Vol. II, page 69). In the letter of Mr. Tynes, dated February 3, 1923, he points out several tracts that are within the general boundary of the developed properties of the respondent. It so happened that the tract in controversy was included in the negotiations, but nothing occurred at any time anywhere in the record to bring to Mr. Dudley's attention the error under which he was laboring in regard to the location of the particular tract now in controversy. It must be remembered that the mining by Knott under the lease proceeded from 1921 to 1929 before any trouble arose. The discovery was made when about seven and one-half acres of the 100 acres in controversy had been mined by the Knott Coal Corporation. Immediately upon discovery of the fact that it was the Kelly tract, which both parties claimed to own, the mining was stopped, as pointed out by the District Judge in his opinion (Vol. I, p. 178), where it was said:

> "This immediate discontinuance of the act of trespass upon discovery of a mere doubt in regard to the title is not consistent with the theory of willful and wanton trespass advanced by the plaintiff. Such conduct is not the act of a man desiring or intending to steal or commit a fraud. It is potent evidence of mistake and inadvertance."

The attempt to state the salient facts omits entirely the important facts developed in defense of the claim for damages. The petitioner at all times refused to notice or recognize the fact that Mr. Dudley labored under a misapprehension as to the location of the land. The Kentucky River Coal Corporation was not in existence when many of the important facts occurred. As Judge Cochran pointed out in his opinion, the Kentucky River Coal Corporation had no knowledge of any of the negotiations between the Slemp interests and the Bright interests, but it was legally chargeable with the results of the settlement made, because it derived title later through some of those companies. But constructive knowledge is not sufficient to charge one with willful trespass. The Kentucky River Coal Corporation did not trespass on the land at all. Its lessee did so innocently, and the land included in the lease to the Knott Coal Corporation was property which it believed in good faith that it owned, even though its claim of ownership was finally adjudicated against it. The very fact that the question was difficult of decision, and that it was extremely doubtful as to which had the better title to the property is sufficient to excuse any trespass from being characterized as willful. The so-called salient facts are so distorted from their setting and true meaning, and so separated from the other facts in the record, that they are lacking in probative value. Notwithstanding the position insisted upon by the petitioner, the concurrent findings of the District Court and the Circuit Court of Appeals sustained the defenses, and there is substantial evidence supporting the decisions. The vital question involved turned on a single fact, whether the trespass of the Knott Coal Corporation was willful or innocent. Even the Special Master found that the Knott Coal Corporation was innocent, and it was the sole trespasser. It was mere dogmatic assertion on the part of the Special Master that a mere lessor, who did not trespass at all, was yet guilty

of willful trespass, because in 1919 the land was included in the lease without any knowledge as to its location, as finally established. Both courts considered the whole case exhaustively, and decided it in accordance with the law of Kentucky.

V.

BASIS OF THE COURT'S JURISDICTION.

This is a case where jurisdiction depended upon diversity of citizenship. The jurisdiction of this Court is invoked under provisions of Section 240 of the Judicial Code, as amended [United States Code, Annotated, Title 28, Section 347 (a)]. But there is no meritorious ground for a review of this case. There is no conflict with the decision of any other circuit. Both the District Court and Circuit Court of Appeals followed the Kentucky law, as laid down by the Court of Appeals of Kentucky in numerous cases. They correctly interpreted and applied the evidence. They did not deny to the petitioner full compensation for its actual loss, and did not invoke or apply any equitable estoppel that was not alleged or proved, in mitigation of damages.

The statute of Kentucky referred to [Section 1244 (a)-1] does not apply to a lessor or landlord whose tenant trespasses, but only to the person who shall willfully or knowingly mine or remove coal from the lands of another. It does not apply at all to an innocent trespass. The references of the District Judge and of the Circuit Court of Appeals to the report of the Special Master were accurate and accorded with the precedents. Such ruling affords no basis for the claim that there is any conflict between the decision in this case and the decision of any other Circuit Court of Appeals in regard to the reports of Masters. There was no departure in any respect from the established rules of law.

The ultimate question involved was a question of fact. Both the lower courts, in accordance with abundant evidence, found this fact in favor of respondent. The concurrent findings of two courts, supported by substantial evidence, will be accepted as unassailable in this court.

Brewer-Elliott Oil & Gas Co. v. United States, 260 U. S. 77, 67 L. Ed. 140, 43 S. Ct. 60;
Alabama Power Co. v. Ickes, 302 U. S. 464, 82 L. Ed. 374, 58 S. Ct. 300.

VI.

RESPONSE TO THE BRIEF IN SUPPORT OF THE PETITION.

Point 1.

It is said that in Kentucky a trespass is presumed to have been willful until proven otherwise. The District Court and the Circuit Court of Appeals both accepted this approach to the question and applied the law of Kentucky.

Judge Ford, of the District Court (Vol. I, page 176), stated:

> "Where, as in this case, the fact of the trespass has been established, the duty rests upon the trespasser to show that the act was innocently committed, and, in the absence of such a showing, it will be presumed to have been willful."

The Circuit Court of Appeals said (Vol. III, p. 130):

> "It is true that under the rule in Kentucky, a trespass that is not explained is presumed to be willful, and the duty to show inadvertence, bona fide relief of right is upon the trespasser."

The cases cited by petitioner under point 1 were considered by the Circuit Court of Appeals, as well as by the

District Court, and applied as fully and sympathetically as any court could apply them in the face of the facts.

Point 2.

The measure of damages under the Kentucky decisions for willful conversion of the coal of another is the market value of the coal after conversion; and for an innocent trespass it is the value of the coal in place, which is conclusively established by the rule of reasonable royalty prevailing in that locality. This is the rule of the decisions cited by petitioner and that was applied by the District Court and by the Circuit Court of Appeals.

The cases under petitioner's point 2 were cited and considered by both courts below. If anything can be considered settled in Kentucky, it is the measure of damages for trespass, and the Circuit Court of Appeals had no difficulty whatsoever in ascertaining the law of Kentucky on this question, or in applying it to the facts of this case. The District Judge was equally alert and accurate.

Point 3.

It is asserted by petitioner that the District Court and the Circuit Court of Appeals disregarded the law in Kentucky, in regard to damages for an innocent trespass. The petitioner seeks to misconstrue the opinions as based on an estoppel which was not pleaded or proven.

The assumption is wholly erroneous. The opinion was not so predicated, and the pleadings were ample. The amended answer fully covered such defenses (Record, Vol. I, p. 153). It appeared from the pleadings and proof that the Kycoga Land Company tract was so located that it was impossible to mine it without going through the Kentucky River Coal Corporation's property. It could be mind only by using the outlets of the Knott Coal

Corporation, lessee of the respondent. Taking advantage of the situation, the petitioner negotiated a lease with the Knott Coal Corporation under which its coal has been, or will be, mined at a good price. (See Lease, Original paper No. 32, Howard Exhibit No. 9, testimony of G. Turner Howard, Vol. II, page 59.) The Kycoga lease adopted the provisions of the lease of Knott with respondent, and this was invoked as an adoption of its terms, which precluded any recovery beyond a restitution by the respondent of the royalty it had received. However, the judgment of the District Court and of Circuit Court of Appeals could be sustained equally upon this ground. When parties, with full knowledge of the facts concerning it, adopt or ratify a contract they thereby make themselves parties to it. 13 C. J., p. 714, Sec. 824; Drakeley v. Gregg, 8 Wall. 242, 19 L. Ed. 409; Baker v. Cummings, 181 U. S. 117, 45 L. Ed. 176.

There is no basis in fact for the argument advanced under petitioner's point 3. The defenses were duly alleged and proven, and this is the first time any criticism has been made in regard to the sufficiency or adequacy of the pleadings. However, since the Court in fact did not base its decision on the question of estoppel, but allowed the petitioner the full damage it had suffered, the point is academic. The Knott Coal Corporation and its lessor, the respondent, were innocent trespassers, and both courts so held.

Point 4.

It is argued that the Court erred in failing properly to apply the principle of corporate knowledge. The argument undertakes to make a trespasser liable for willful trespass if it turns out that he was in error, no matter how innocent he was in fact. There is no such rule of law. In

order to make a trespass willful, there must be actual knowledge, and constructive knowledge is not sufficient.

Guffey v. Smith, 237 U. S. 101, 58 L. Ed. 850;
Pine River Logging Co. v. U. S., 186 U. S. 279, 46 L. Ed. 1164;
Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 36 L. Ed. 761-762;
U. S. v. St. Anthony Ry. Co., 192 U. S. 524, 48 L. Ed. 548;
U. S. v. Homestake Mining Co., 117 Fed. 481.

No case has been cited by the petitioner to sustain its novel argument. Where a trespass has been committed in legal bad faith, but in moral good faith, because of a mistaken opinion as to legal rights, the trespasser is compelled to make restitution, but is not liable for punitive damages.

Mason v. U. S., 260 U. S. 545, 67 L. Ed. 386;
Gulf Ref. Co. v. U. S., 269 U. S. 125, 70 L. Ed. 195.

The very fact that the question of who had the better title was difficult of decision, and entailed labor on the Court, has been held by the Court of Appeals of Kentucky as sufficient evidence of innocence. The contest over the title in this case was real, and an extended investigation was necessary to determine it in favor of the petitioner. See long opinion of Judge Cochran (Record, Vol. I, pp. 49-69). The Court of Appeals of Kentucky, in Blackberry Ky. & W. Va. Coal & Coke Co. v. Kentland Coal & Coke Co., 225 Ky. 346, 8 S. W. (2d) 425, where there was a confusion of titles, said:

> "The difficulty encountered by this court in arriving at a conclusion as to which of the two claimants should be awarded the decision affords ample evidence that the Hatfields and those claiming under them may well have indulged in good faith belief that they were the owners of the 80 acres of land. Under the facts appearing in the record, this court concludes that the

chancellor correctly adjudged the trespass complained of to have been an innocent rather than a willful trespass." Quoted in Kentucky Harlan Coal Co. v. Harlan Gas Coal Co., 245 Ky. 256, 53 S. W. (2d) 538.

In Middle Creek Coal Co. v. Harris, 225 Ky. 119, 265 S. W. 465, it was said:

> "Construing the deed with reference to all its parts, and considering it in the light of these circumstances, we are inclined to hold that the reservation excluded the lot from the conveyance; however, in view of the doubtful language of the deed and of the fact that it is susceptible of the construction placed upon it by the Coal Company and of the confusion existing as to the location of the lines, we do not think the company was guilty of a willful trespass in mining the coal in question."

A willful trespasser is one who knows he is wrong, while an innocent trespasser is one who believes he is right or whose mistake was inadvertent or lacking in wrongful intent.

In Swiss Corp. v. Hupp, 253 Ky. 552, 69 S. W. (2d) 1037, the Court said:

> "The prime problem is to determine the quality of the appellees' acts in entering upon the property and extracting the oil. That they were trespassers is no longer in doubt. Their classification as willful or as innocent trespassers, as commonly called, is the hinge upon which the case hangs and upon which the decision as to the extent of recovery must turn. In the approach to the consideration of the evidence, we may suggest the abstract distinction between a willful and an innocent trespasser met with in the opinions dealing with the character of cases, namely, the one who knows he is wrong and the other believes he is right. The degree of culpability as between the two determines the extent of liability. The former

class of wrongdoers finds the way of the transgressor hard under the law. They are held to a strict accountability for their malappropriation of another's property. Complete restitution without credit for expenses incurred or deduction of costs of production is required. But those who invade the property of another inadvertently or under a bona fide belief or claim of right and extract minerals are allowed credit for proper expenditures in obtaining or producing them. While not allowed any profit, they are not be penalized. See Bozeman Mortuary Association v. Fairchild, 253 Ky. 74, 68 S. W. (2d) 756."

Point 5.

It is insisted that the findings of the Special Master should have been adopted, notwithstanding the circumstances surrounding that document. It will be recalled that the order of reference to the Special Master reserved the right of final decision to the Judge, as though no Master's report should be made, and no presumptive effect was to be given to it. Moreover, both parties recognized the Master's report as indefensible and filed exceptions to it. The cases cited in the petition are not applicable to such a situation. The Circuit Court of Appeals dealt with this question as follows:

"As already noted, the master considered the trespass willful. The Court disagreed. We are urged to accept the conclusions of the Master notwithstanding their rejection, on the ground that the master had superior opportunities for ascertaining the true facts and the presumption in favor of their correctness. The order of reference, however, reserved full power of review and specifically denied any presumption to be attached to the master's findings. In such situation they were not to any extent binding upon the independent judgment of the court, nor do they bind us. Atherton v. Anderson, 99 Fed. (2d) 883, 890. This

is not to say that inferences may not be indulged in favor of the Master's findings in the usual case where there is conflict of direct evidence, and the master has seen and heard the witnesses and the court has not. Compare Atherton v. Anderson, 86 Fed. (2d) 518, 522. But the master's findings are here based wholly upon inference, the reasonableness of which may be as fairly determined by the court as by him, and in this situation any presumption in favor of his conclusions can be of but slight importance. This is particularly true when analysis of his reasoning discloses that he drew no distinction between mere negligence and willful or wanton disregard of others' rights. That such distinction is recognized in law, we have had occasion to note in respect to tortious conduct generally. Turner v. Buchannan, 94 Fed. (2d) 723."

Point 6.

The basis of petitioner's claim was that by the inclusion of this small tract in the large lease to Knott an intention to rob the petitioner of the land was manifested. The Court addressed itself to petitioner's argument. The doctrine of liability of a mere lessor is very much controverted, but in this case the lessor was held liable for the tenant's trespass. But we find no case where a landlord has been held liable except as an innocent trespasser. The liability rests upon the legal theory that, by leasing, the landlord authorizes the trespass to be committed, and is therefore under a joint liability with the lessee. The full effect of this doctrine was given by the lower court. There can be no willful trespass from the mere fact of leasing, where lessor in good faith believes itself to be the owner of the land.

Point 7.

It is argued that the Circuit Court of Appeals misconstrued the Kentucky statutes, Section 1244 (a)-1. This

statute is limited to the actual trespasser, and does not apply at all unless the trespass was willful or intentional. Obviously the statute could not be applied to the landlord. Its terms are directed solely at the trespasser who enters on the lands of another knowingly and willfully. The statute had no application to this case, and no authority for petitioner's position is cited.

Point 8.

The lower courts, after exhaustive and complete consideration, disposed of the petitioner's claims. They found in accordance with the evidence that the trespass was an innocent one, and that full compensation was afforded the petitioner by the judgment of the District Court, awarding the royalty or value of the coal in place. The whole argument is on the erroneous assumption that the petitioner is right on the question of fact as to the character of the trespass. But the concurrent findings of the two courts against petitioner on the issue of fact takes away the whole foundation of his argument. All of petitioner's rights have been fully and adequately protected. No provision of the Constitution has been infringed. The law prevailing in Kentucky was applied to the facts of the petitioner's case, and full compensation was awarded. That was all it was entitled to receive in any court of justice.

Respectfully submitted,

PETER T. WHEELER,
Hazard, Kentucky,
SIMEON S. WILLIS,
Ashland, Kentucky,
Attorneys for Respondent,
Kentucky River Coal Corporation.

Ashland, Kentucky,
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